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01-726

No. 01-

IN THE
Supreme Court of the United States

DAVID HIPP, BRAD STEIN, MIKE STELL,
and All Others Similarly Situated,

Petitioners,

v.

LIBERTY NATIONAL LIFE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

According to the Administrative Office of the United States Courts, from 1988 to 1997, 43.61 percent of employment jury verdicts for plaintiffs were reversed, but only 5.8 percent of jury verdicts for defendants were reversed. This gap between reversal rates for plaintiffs versus defendants is larger than any other category of cases. The Supreme Court has addressed one possible cause of this disparity — lack of a clear directive — through a series of decisions culminating in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

In this employment discrimination case where a jury verdict was rendered for the plaintiff, and where the appeal was argued before *Reeves*, but decided after *Reeves*, and where rehearing and rehearing en banc were requested after, and citing to, *Reeves*, the Eleventh Circuit totally ignored the clear, unanimous opinion of this Court and reversed the plaintiffs' verdict.

The first question presented is whether the Court of Appeals erred by failing to apply the principles announced by this Court in *Reeves* across the spectrum of means of proving employment discrimination to and including a claim of pattern and practice of age discrimination, instead of limiting those principles to only a prima facie analysis in a discrimination case.

The second question presented is whether the Court of Appeals erred by holding, in conflict with the Eighth and Tenth Circuits, that the temporal scope of an age

discrimination pattern and practice collective action ends on the date of the filed claim, and thus cannot, as a matter of law, include a plaintiff who was impacted during the time period but not terminated until after the filing of the representative charge.

PARTIES TO PROCEEDING

The parties to the proceeding are as listed on the cover page, plus James Lee, Harold Young, Tony Agee, Blake Tuggle and Harold Carter.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

Hipp v. Liberty Nat. Life Ins. Co., __ F.3d __ (11th Cir. (Fla.) Aug 14, 2001) (TABLE, NO. 99-10699-CC) – Petition for rehearing and for rehearing en banc, denied. [Appendix C]

Hipp v. Liberty Nat. Life Ins. Co., 252 F.3d 1208, 80 Empl. Prac. Dec. P 40,646, 14 Fla. L. Weekly Fed. C 747 (11th Cir. , May 29, 2001) (No. 99-10699) — [Appendix A]

Hipp v. Liberty Nat. Life Ins. Co., 65 F. Supp.2d 1314, 12 Fla. L. Weekly Fed. D 543 (M.D.Fla., Aug 15, 1999) (No. 95-1332-CIV-T-17A). [Appendix B]

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and order on May 29, 2001, and denied rehearing and rehearing en banc on August 14, 2001. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

[none]

STATEMENT OF THE CASE

Three former Liberty National Life Insurance Company (hereafter "Liberty National") district managers, on behalf of themselves and others similarly situated, filed an action

in Florida state court pursuant to the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. §§ 621-34, and the Florida Civil Rights Act of 1992 (FCRA), Fla. Stat. Ann. §§ 760.01-760-11. The district managers alleged that Liberty National was then engaged in a pattern and practice of age discrimination. After Liberty National removed the case to federal court, plaintiffs informed the district court they intended to pursue a collective action under 29 U.S.C. § 216(b). Appendix p. 3a (hereafter, Appendix Citations will be to "App. __"). The district court ultimately approved the collective action and adopted the following class definition proposed by plaintiffs: "All persons who are, or were, employed by Liberty National Life Insurance Company on or after August 25, 1993, who are, or were, managerial employees, district managers or above, residing in the United States, who were over 40 years of age." App. 4a.

Over twenty former district managers opted into the collective action. After court-ordered mediation resolved most of the cases, the claims of the remaining ten former district managers were tried before a jury over the course of six weeks. The jury returned verdicts in favor of seven plaintiffs, and against three, finding that Liberty National had engaged in a pattern and practice of age discrimination resulting in the constructive discharge or other tangible job detriment to seven of the ten plaintiffs. App. 5a, 31a-32a, n.25.

On appeal from the jury verdicts and final judgments entered thereon, Liberty National contended, as pertinent to this petition, that: (A) the district court erred by failing to grant Liberty National's motions for judgment as a matter of law on the issues of (1) pattern and practice of age

discrimination; and (2) individual claims for constructive discharge; and (B) the district court erroneously determined the forward cutoff dates for plaintiffs' opt-in collective action brought under 29 U.S.C. § 216(b). By panel decision dated May 29, 2001, the Eleventh Circuit reversed the judgments entered upon the jury verdicts in plaintiffs' favor, holding as follows:

> • Plaintiffs, Hipp, Stell and Stein, who had each filed individual EEOC charges, presented insufficient evidence of a pattern and practice of age discrimination to withstand defendant's motion for judgment as a matter of law. App. 31a-36a.
>
> • Plaintiffs Hipp, Stell and Stein presented insufficient evidence of their constructive discharges in violation of the ADEA to withstand defendant's Rule 50 motions. App. 37a-71a.
>
> • We conclude the proper forward cutoff date is the date of filing of the representative charge. Plaintiffs who do not allege discriminatory treatment occurring during this period may not opt into a § 216(b) action. In other words, a plaintiff must have been able to file his or her charge of discrimination on the date the representative plaintiff filed the representative charge. App. 2a-3a.

Between oral argument and issuance of the per curiam decision, the Supreme Court decided *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). Despite the petitioners' filing of a notice of supplemental authority advising the Eleventh Circuit of *Reeves*, and a petition for rehearing en banc advising the Court that the Panel had ignored Supreme Court precedent, the Eleventh Circuit failed to even cite the controlling authority of the Supreme Court.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Brazenly Ignores The Principles Clearly Enunciated In This Court's Decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000), And Thus Challenges This Court's Authority.

The Eleventh Circuit did exactly what the Supreme Court criticized the appellate court for in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097 (2000). The Circuit "misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence." 120 S. Ct., at 2108. What is worse, the Eleventh Circuit acted in spite of the *Reeves* decision having been published between oral argument and its decision, and the *Reeves* decision having been emphasized to the Circuit on the petition for rehearing or for rehearing en banc. *Hipp v. Liberty National Life Insurance Co.*, 252 F. 3d 1208, (May 29, 2001), *rehearing and rehearing en banc, denied*, __ F. 3d __ (11thCir. August 14, 2001). Appendix A and C.

Succinctly put, such open defiance of this Court's authority cannot be tolerated.

While the appellate courts disclaim any responsibility to serve as super-personnel departments in employment disputes, they continue to act as if they were responsible for protecting corporate management. This is not hyperbole. This is a statement of undeniable fact.

In "Double Standard on Appeal: An Empirical Analysis of Employment Discrimination Cases in U.S. Courts of Appeals," a compilation of data from the Administrative

Office of the United States Courts, Professors Theodore Eisenberg and Stewart J. Schwab of Cornell Law School, report:

> . . . the differential between plaintiff and defendant success rates is greater in employment discrimination cases than any other category of civil cases. . . . When an employment discrimination defendant wins at trial and the case is reviewed on appeal, only 5.8 percent of those judgments are reversed. By contrast, when an employment discrimination plaintiff wins at trial and the case is reviewed on appeal, 43.61 percent of those judgments are reversed.

Eisenberg and Schwab, Double Standard on Appeal, p. 1.

This is one of those 43.61 percent of plaintiff's verdicts reversed on appeal, and this case epitomizes the necessity for Supreme Court action in order to prevent the unraveling of *Reeves* and sending the Supreme Court down a never-ending spiral of micro-rulings on employment discrimination issues.

The Constitution guarantees the right to a jury trial because the reason and common sense of jurors, grown from their experiences, stands as a check and balance against arbitrary government power. For the most part, the judiciary is far removed, in time and position, from the realities of the modern workplace. This presents all the more reason for trusting important decisions to juries and respecting the decisions they make. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 438, 116 S. Ct. 2211 (1996).

The jury in this six-week trial worked diligently. They were able to discern a pattern and practice of discrimination. Most telling of their diligence, this jury determined that the pattern and practice adversely impacted seven of the ten plaintiffs, but not three of the plaintiffs. This was not a runaway jury deserving of an appellate court's rebuke. The Eleventh Circuit not only tossed aside the work and sacrifice of these common citizens, but also did so in a manner that throws down the gauntlet challenging this Court's authority.

The jury heard and saw all the evidence and witnesses. The Eleventh Circuit read a so-called "cold record." Worse, in reaching the decision they did, the Eleventh Circuit ignored crucial, damning, direct evidence of intent to discriminate by the highest officers of respondent, Liberty National.

Simply put, the Eleventh Circuit knowingly and intentionally chose to ignore the dictates of *Reeves*, failing even to acknowledge its existence.

When confronted with the Administrative Office's data, and the malign ignorance of *Reeves* practiced by the Eleventh Circuit in this case, only forceful and decisive action by the Supreme Court will return the scales of justice to balance.

Plaintiffs are not asking the Supreme Court to simply review the factual determinations of the Eleventh Circuit and act as referee between it and the jury. Rather, the Eleventh Circuit's clearly erroneous actions in this case are indicative of the double standard noted by Eisenberg and Schwab. The Supreme Court must clearly and unequivocally announce to the Circuits that it is time to treat discrimination cases fairly and equally according to standards that the Court has announced but which the appellate courts apparently refuse

to follow. Otherwise, the Supreme Court will continue to be bombarded with nit-picking technical cases where the Supreme Court is tasked with parsing out the manipulations and gyrations used to avoid the dictates of this Honorable Court.

Supreme Court review is necessary, in other words, to protect the very foundation of the authority of the Supreme Court. *Reeves* and its predecessors establish broad, clear guidelines. The Eleventh Circuit chose to ignore those guidelines, apparently thinking it applied in only a narrow class of cases where plaintiffs attempt to prove discrimination through the prima facie case method.[1] The Supreme Court must make clear its intent to apply the *Reeves* analysis to *all* indirect evidence cases, and not just the narrow band it was relegated to by the Eleventh Circuit.

Whatever conclusions can be drawn from the Eisenberg and Schwab compilation, there can be only three[2] logical explanations for the fact — an indisputable fact as it emanates from the records of the Administrative Office of the United States Courts — that "the differential between plaintiff and

1. Of course, to some extent we are left to speculate because the Eleventh Circuit decision never mentioned, much less addressed, this Court's *Reeves* decision.

2. A fourth potential explanation is that 43.6 percent of the juries in employment discrimination cases are making incorrect decisions. This is not possible. Reversals by the Courts of Appeals should be based on legal error that the trial court should not have submitted the case to the jury in the first place. Moreover, such an explanation would lead to the absurd conclusion that juries are wrong 43.6 percent of the time when they rule for plaintiffs, but are right 94.8 percent of the time when they rule for the defense. Thus, unless the differential is simply ignored, the explanation for its existence can only be found in some fault at the judicial level.

defendant success rates is greater in employment discrimination cases than *any* other category of civil cases . . ." *Id.*, (emphasis added):

1. The Supreme Court of the United States has failed to give clear guidance to the lower Courts; or,

2. The Supreme Court of the United States has given clear guidance, but the Courts of Appeals are refusing to follow it; or,

3. The Supreme Court of the United States has given clear guidance, the Courts of Appeals are correctly applying the dictates of this Court, but the United States District Judges are unable to apply the clear guidance to the facts presented at trial 43.61 percent of the time.

The first possible explanation fails because the Supreme Court has spoken clearly on this subject. The third possible explanation is unlikely due to the massive numbers of trial judges this would implicate. Logic, and analysis of the Eleventh Circuit's opinion in this case establishes that it is the second possible explanation that is the most likely.

As far back as 1983, the Supreme Court has had to struggle with correcting error by the circuit courts in discrimination cases even after clear policy had already been established. *United States Postal Service Board of Governors v. Aikens*, 406 U.S. 711, 103 S. Ct. 1478 (1983).

The standards set by the Supreme Court and ignored by the Court of Appeals are clear. Writing for a unanimous Court, Justice O'Connor set out "the kind and amount of evidence

necessary to sustain a jury's verdict that an employer unlawfully discriminated on the basis of age" when pursuing a theory on indirect evidence. *Reeves*, 120 S. Ct. at 2103. Specifically:

> in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record. In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.... "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." ... Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. See Wright & Miller 299. That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses."

Reeves, 120 S. Ct. at 2110. (citations omitted)

While *Reeves* involved proof through the prima facie method, the principles enunciated above should equally apply to a pattern and practice case based upon indirect evidence.

The Eleventh Circuit, however, made inferences hostile to the plaintiffs, weighed the evidence without the requisite presumptions, parsed the evidence rather than considering the whole record, and completely ignored other highly probative evidence.

In this case, the Eleventh Circuit circumvented the Supreme Court's clear policies by first defining the temporal scope very narrowly to exclude four of the seven prevailing plaintiffs; then,

- without even considering the evidence applicable to these four plaintiffs,
- and by misapplying the standards set by this Court,
- and by completely ignoring direct evidence of the age discrimination policy set by the chief executive officer of the company, Mr. Hudson,
- and by completely ignoring direct evidence of following the age discrimination policy by the second in command of the company, Mr.King,
- and by ignoring admissions by other high officers of the company that such a policy and practice existed,
- and ignoring other evidence of the pattern and practice of older district managers testifying to their mistreatment and preferential treatment to younger district managers,
- and finding completely non-probative a company-wide policy of age discrimination in hiring,

the Eleventh Circuit dismissed the pattern and practice claim. This left the individual claims of three plaintiffs — Mr. Hipp, Mr. Stell, and Mr. Stein. The Eleventh Circuit then proceeded to consider each case in an individual vacuum without any reference to the evidence it considered but dismissed in the pattern and practice case, and, of course,

again ignoring all the evidence it had ignored in the pattern and practice case.

Taking the facts as stated in the Eleventh Circuit's opinion, and then examining the record evidence the Eleventh Circuit chose to ignore, the Supreme Court will see how deceptive the Eleventh Circuit was in trying to avoid the clear principles laid down by the Supreme Court.

One blatant example of the Eleventh Circuit's tortured logic is where direct evidence was used to preclude one plaintiff's claims, but it was not even considered as part of the pattern and practice evidence.

> At oral argument, counsel for Plaintiffs argued [plaintiff Mr.] Lee did not "put two and two together" and realize he had been discriminated against until several months after he left the company. In light of the fact that Lee testified that King told him he needed to retire because he was too old, it is difficult to believe Lee did not suspect age discrimination at the time he retired. . . . Since Lee suspected age discrimination at the time he resigned, equitable tolling cannot apply to save his claim.

App. 20a-21a, nn.11 & 13.

However, in considering whether there was a pattern and practice of discrimination, the Court completely ignored the fact that the number two person in the company, Mr. King, had specifically and clearly made a statement to Mr. Lee which would constitute direct evidence of age discrimination. In essence, Mr. Lee could not sue because he was told by the second highest officer in the company when he was forced

out that it was due to his age; but, the fact that the second highest officer in the company was forcing people out because of their age was of no probative value in considering whether there was a pattern and practice of age discrimination.

Put rhetorically, is not a pattern a series of similar events? According to the Eleventh Circuit, a series of older district managers being told they are too old does not constitute a pattern of age discrimination. A series of older district managers being told that the older they are the more expensive they are to the company because health care insurance rises with age does not constitute a pattern of age discrimination. A series of older district managers being told that the company is in a period of massive change, but the older people are more resistant to change is not a pattern of age discrimination. And, by inference, all of this combined, according to the Eleventh Circuit neither establishes nor is relevant to proving a pattern of age discrimination.

Then, in conflict with the First, Third, Fourth, Six, Seventh, Eighth, Ninth, and Tenth Circuits, the Eleventh Circuit rejected the well-recognized principle that discrimination in one area of the company is evidence of discriminatory intent in general by the company.[3] The Eleventh Circuit dismissed as wholly without

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3. *United Sates Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 103 S. Ct. 1478, 1482, 75 L. Ed. 2d 403 (1983), at 713-14 n.2, 103 S. Ct. at 1480-81 n.2.; *Becker v. ARCO Chemical Company*, 207 F.3d 176, 194 n.8 (3d Cir. 2000); *Robinson v. Runyon*, 149 F.3d 507, 512-13 (6th Cir. 1998); *Heyne v. Caruso*, 69 F.3d 1475, 1480 (9th Cir. 1995); *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1214 (3d Cir. 1995); *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 897-98 (9th Cir. 1994); *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1156 (10th Cir. 1990); *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 349-50 (1st Cir. 1989); *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097,

(Cont'd)

relevance the fact that defendant discriminated against older agents in hiring.

> Viewing the evidence in the light most favorable to Plaintiffs, *it appears* Plaintiffs *may have proven*[4] it is Liberty National's standard operating procedure to discriminate against older applicants for positions as agents. There was substantial testimony at trial that Liberty National subjected applications from individuals over age 55 for positions as agents to additional scrutiny.

App. 35a n.30 (emphasis added). Incredibly, the Eleventh Circuit went from this finding to state unequivocally

> [w]e do not see, however, how that alleged policy has any relationship to Plaintiffs' claims.... While it was certainly a deplorable policy to refuse to hire agents over age 55, *it simply is not probative* of a plan on the part of Liberty National to force out District Managers in their early 40s.

Id. (emphasis added).[5]

(Cont'd)

1104 (8th Cir. 1988); *Mullen v. Princess Anne Volunteer Fire Co.*, 853 F.2d 1130, 1133 (4th Cir. 1988); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1423-24 (7th Cir. 1986); *Phillips v. Smalley Maintenance Serv., Inc.*, 711 F.2d 1524, 1532 (11th Cir. 1983); and *Sowers v. Kemira, Inc.*, 701 F. Supp. 809, 816 (S.D. Ga.1988).

4. The Court's "it appears ... may have proven" language exemplifies how the court failed to take inferences in the light most favorable to plaintiffs and impermissibly insinuates itself as the trier of fact.

5. *Estes v Dick Smith Ford, Inc.*, 856 F.2d 1097, 1104 (8th Cir. 1988)

(Cont'd)

These two examples, alone, show that the Court not only failed to consider the record as a whole, but also utterly failed to give the Plaintiff the benefit of the inferences from the evidence.

There is more evidence the Court minimized in a dismissive manner instead of considering in the light most favorable to the plaintiffs. David Hipp, for example, "said the criticism he received prior to 1991 was constructive and helpful, but after 1991 [when the new CEO, Mr. Hudson, took over Liberty National and declared his antagonism toward older employees], 'it was nothing but harassment.'" App. 44a. "Hipp testified that Liberty National's C.E.O., C.B. Hudson, said on at least one occasion that 'older people are harder to get to change,' and that King and Horton [another regional vice-president at the time] made similar statements." *Id.*

> Hipp also complained it was difficult for him to abide by Liberty National's alleged policy of not

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(Cont'd)

> Judge Posner has explained: [d]efendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it. . . . The law tries to protect average and even below-average workers against being treated more harshly than would be the case if they were a different race, sex, religion, or national origin, but it has difficulty achieving this goal because it is so easy to concoct a plausible reason for . . . firing . . . a worker who is not superlative. A plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries.

> hiring agents over age 55, because his district, Fort Myers, Florida, had a large elderly population. He talked to Horton about this problem, but Horton said King would not allow Hipp to violate the over-55 policy. Hipp also testified that Horton told him to fire an agent named Wes Adams because Adams was too old.

App. 47a at n.44. "Hipp testified Adams was in his 60s at the time." Horton told Hipp that another sales agent, Johnson, "was too old to do the job [of district manager]. Horton also made negative comments about the age of Hipp's secretary." App. 48a.

Before he left the company, Hipp discussed his unhappiness with Horton, and Horton told him things were worse in the home office. It turns out that Horton, himself, was told by King that Horton was too old. App. 44a at n.38. Hipp testified that it took him almost a year before he could figure out what was going on in the company. He started seeing other older District Managers leaving the company. The more he thought about it, he realized Liberty National was forcing out the older District Managers. App. 52a.

David Hipp's story is indistinguishable from Mike Stell's. "Stell testified that King said at a meeting 'that change would be easier to make if we had younger district managers,' and King told him that sometimes it was easier to replace employees than to retrain them." Stell claimed King was "more of a buddy" to the younger District Managers but "more business-like with the older district managers." App. 57a.

According to the Eleventh Circuit, direct evidence of age animus statements are of no probative value as to whether

there was a practice of discrimination within the company, even though the statements were made by the chief executive officer, Mr. Hudson, and the second-in-command of the corporation, Mr. King, and a regional vice president, Mr. Horton.

Another blatant example of the Eleventh Circuit's violating the Supreme Court's clear rule to review the evidence in the light most favorable to the plaintiffs is at footnote 62: "As mentioned above, Stell's willingness to return to the company if he could be transferred out of King's division indicates he did not believe discrimination was Liberty National's 'standard operating procedure'." App. 61a.

The Eleventh Circuit is wrong. The Eleventh Circuit is so demonstrably wrong that an undergraduate student of logic would have no trouble disproving the syllogism and the resultant conclusion.

If Liberty National did not want Stell gone, if they were not discriminating on the basis of age, if (as the Court inferred giving the benefit of the inference to the defendant rather than the plaintiffs) the problem lay only in Andy King being a bad manager, then why not transfer Mr. Stell? Certainly a reasonable jury could conclude that this is because of the company's desire to drive out older district managers.

Again, it is apparent that the Eleventh Circuit is insinuating itself as the trier of fact instead of following the dictates of *Reeves*.

After Stell's resignation, he spoke with other people and came to the conclusion that he "fit in the pattern of the older district managers being replaced by younger district

managers." He then determined King's treatment of him was part of "a program designed by the management, upper management of this company, to remove the older district managers." App. 61a.

Also, the same as Lee and Hipp, Stell testified that Horton told him during his first week as District Manager in Troy, Alabama, that his predecessor "was forced to either retire or be replaced because he had gotten too old to be effective in his job." *Id.*. at n.63.

Again, Petitioners are not asking the Supreme Court to simply correct the Eleventh Circuit's error. Such blatant error is symptomatic of the much larger problem demonstrated by Eisenberg and Schwab which should have been corrected by the unanimous decision in *Reeves*.

The Eleventh Circuit's continued rejection of the required *Reeves* analysis does not end here.

Continuing with the same pattern is the testimony of Brad Stein. Stein testified that his replacement, Mr. Watson, did not immediately get the position because King said Watson was too old. Stein testified that at a meeting of District Managers, King introduced the newer District Managers to "[a]ll you gray hairs." He heard King use the phrase "RC factor" to refer to older employees' "resistance to change." App.66a. On several occasions, King said the company needed younger employees because older workers were resistant to change. *Id.*

This is just some of the evidence the Eleventh Circuit cited in its opinion, but failed to consider in the light most favorable to plaintiffs. Perhaps more demonstrative of the Eleventh Circuit's malignant ignorance of the dictates of

Reeves is the plethora of other record evidence the Eleventh Circuit wholly ignored.

Unfortunately, limitations of a certiorari petition prevent plaintiffs from recounting all the evidence ignored by the lower court. By way of example and not limitation, however, plaintiffs adduced the following evidence which established a company-wide pattern and practice of age discrimination culminating with the constructive discharge of numerous older district managers, including the seven plaintiffs who prevailed below:

- Liberty National CEO, C.B. Hudson, announced in 1991 a company policy in the presence of numerous witnesses to reduce health insurance costs by decreasing the number of older employees responsible for higher health insurance premiums.

- C.B. Hudson enunciated the company policy concerning the "resistance to change" stereotype, which the regional vice-presidents used as one of their principal weapons of harassment, regularly informing older district managers that they were resistant to change and, consequently, in need of replacement.

- Regional vice-president Horton actually disclosed Liberty National's plan to force older district managers to resign. He told plaintiff Swanson that the vice-presidents "would give them [older district managers] a little bit more difficult tasks to accomplish" than younger district managers "to keep the heat on" and were instructed to "build a file" against older employees so they could be terminated if they failed to resign. R17-349-213-214. Horton admitted to former district

manager McKown that "[i]t appears to me that older people are being run out of the company." R17-349-25. Horton also admitted to plaintiff Stell that district manager Basil Drake "was forced to either retire or be replaced because he had gotten too old to be effective in his job." R15-344-116. Mr. McKown identified Drake and five other district managers who left the company and were replaced by younger district managers.

• Ray Linderman, vice-president of Liberty National Fire Insurance Company and a risk management officer for defendant's parent company, told plaintiff Stell: "[Y]ou need to look at the pattern of what's happening. You're one of the older employees that they're getting rid of. . . . They started in the home office with the older RVPs. They worked down to the supervisors and department heads. Then they worked down to the district managers. You fit in that pattern." R15-344-171-72.

• The panel decision notes that plaintiffs offered statistical evidence through a Liberty National exhibit, but Liberty National withdrew the exhibit, preventing plaintiffs from producing statistical proof. App. 33a, at n.28. The district court ruled that because of the problems defendant created by withdrawing the exhibit, defendant was "hardly in a position to complain about the absence of statistical evidence." R12-422-8. In fact, the district court considered sanctions against defendant but declined to impose them because neither party was prejudiced by Liberty National's conduct in light of the jury verdicts. The district court stated, however, that "[s]hould it later turn out that this was an incorrect assumption because the absence of statistical evidence becomes important on appeal, the Court may rethink its

determination that sanctions are not warranted in this case." R12-422-8.

• Plaintiffs were prepared to produce even more evidence of Liberty National's policy and practice of age discrimination, but the district court, at defendant's behest, excluded further testimony on that issue, finding the evidence cumulative. R20-351-2. On this point, the district court noted:

> Moreover, as Plaintiffs rightly point out, the Court excluded further evidence on the policy and practice issue, on the ground that further evidence on that point would be cumulative. The Defendant cannot have it both ways by moving for the exclusion of evidence on a point at trial and arguing post-trial that there was not sufficient evidence on that point. The Defendant is now in the position of having to live with the consequences of having made that strategic decision during trial.

R12-411-7-8. Thus, Liberty National should have been estopped from arguing on appeal that plaintiffs' pattern and practice evidence was insufficient.

The Eleventh Circuit cited none of this evidence. The panel failed to apply the appropriate standard of review established by *Reeves* for Rule 50 motions and imposed upon plaintiffs a more stringent burden of proof than prevailing case law requires for pattern and practice cases. Plaintiffs' pattern and practice evidence adduced at trial — even though plaintiffs were deprived of statistical proof and thwarted by defendant's successful tactic of objecting to "cumulative

evidence" — went far beyond "vague allegations of a policy forcing out older District Managers." Rather, plaintiffs presented direct evidence that age discrimination was Liberty National's standard operating procedure, thereby shifting the burden to Liberty National to prove by clear and convincing evidence that its employment decisions were not made pursuant to that policy.

The jury was able to sift through this evidence, find a pattern and practice, and discern that three of the ten plaintiffs were not actionably affected by this pattern and practice.

To prove a pattern and practice of discrimination, plaintiff need prove by a preponderance of the evidence that discrimination was the company's standard operating procedure. *Bazemore v. Friday*, 478 U.S. 385, 106 S. Ct. 3000 (1986). A plaintiff need "not prove discrimination with scientific certainty, rather his or her burden is to prove discrimination by a preponderance of the evidence." 478 U.S. at 398, 106 S. Ct. at 3007. A determination of pattern and practice discrimination is subject to the clearly erroneous standard on review. *Id.*

Instead of applying this standard to the review of the pattern and practice case, and instead of applying a reasonable burden of proof, the Eleventh Circuit used a lower standard of review and a more demanding burden of proof; thus, circumventing the Supreme Court's dictates.

The Eleventh Circuit made inferences hostile to the plaintiffs, weighed the evidence without the requisite presumptions, and completely ignored other highly probative evidence. Specifically, plaintiffs were required to prove that there was not just conflicting evidence, but that there was "a substantial conflict in the evidence." App. 38a.

What makes no sense is that the Eleventh Circuit required a higher burden of proof at the Judgment as a Matter of Law stage — where all inferences are supposedly taken in plaintiffs' favor — than plaintiffs were required to prove to the jury. Such a brazen challenge to, and deliberate ignorance of, the Court's dictates in *Reeves*, cannot be left unchecked.

II. On An Issue Of First Impression For The Eleventh Circuit, The Decision Below Sets The Temporal Scope Of An Age Discrimination Collective Action Too Narrowly And In Conflict With The Eighth And Tenth Circuits.

As noted by the Eleventh Circuit, the temporal scope of a collective action under 29 U.S.C. § 216(b) raises "important issues" which have not yet been directly addressed by the Eleventh Circuit. App. 2a.

In *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1101-02 (11th Cir.), *cert. denied*, 519 U.S. 987 (1996), the Eleventh Circuit held that the single-filing rule previously followed in Title VII cases applies to collective actions filed under the ADEA. Under "the 'single-filing' (or 'piggybacking') rule, a grievant who did not file an EEOC charge may opt into a class action by 'piggybacking' onto a timely charge filed by one of the named plaintiffs in the class action." *Id.*, at 1101 (footnote omitted). "The principle behind the piggybacking rule is to give effect to the remedial purposes of the ADEA and to not exclude otherwise suitable plaintiffs from an ADEA class action simply because they have not performed the 'useless act of filing a charge.' " *Id.*, at 1103.

The Eleventh Circuit terminated the forward scope of the collective action on the date the representative charge

was filed. App. 27a. This ruling barred the claims of plaintiffs Carter, Agee and Tuggle who resigned or were discharged after plaintiff Stein filed the representative charge on December 9, 1994. App. 22a-23a.

Assuming, as it must under *Reeves*, that a pattern and practice of discrimination existed, these excluded plaintiffs were subjected to age discrimination. This was a continuing violation which the evidence showed, according to the jury's verdict, continued on past the filing of the administrative claim. Unfortunately for these plaintiffs, they successfully fought to keep their jobs in spite of the discrimination, and succeeded until after the representative charges were filed. Yet, the Eleventh Circuit says this is not enough to allow them to participate in this collective action.

The court's ruling on this point overlooks the fundamental purpose of the piggybacking procedure authorized by the Eleventh Circuit in *Grayson* — that to accomplish the remedial purposes of the ADEA, otherwise suitable claims should not be excluded from a collective action simply because plaintiffs have not performed the useless act of filing an EEOC charge. *Grayson*, 79 F.3d at 1103. In this case, when Carter, Agee and Tuggle were terminated, the present suit already had been filed. App. 23a. At that point, Liberty National certainly had notice of the district managers' age discrimination claims and the EEOC already had investigated the allegations under Stein's representative charge. Further, because many district managers already were embroiled in acrimonious litigation with their employer, it is highly unlikely that the EEOC's investigative and conciliatory powers would have resolved these plaintiffs' claims. Under such circumstances, filing EEOC charges would have served no useful purpose.

The district court permitted Carter, Tuggle and Agee to join the collective action based on the following conclusion: "Unless there is persuasive evidence that Defendant's alleged 'uniform practice and policy of age discrimination' ceased on December 9, 1994, the Plaintiffs' claims that are the result of this same practice or policy, subsequent to December 9, 1994, certainly grow out of the representative charge of discrimination." R8-287-16. Based on this finding, and according appropriate deference to the standard of review previously mentioned, the forward cutoff date in this case should be extended to the date when defendant's policy and practice of age discrimination ended.

Since the limit imposed by the Eleventh Circuit cuts off the time period regardless of whether the alleged discriminatory policy has ended, the Eleventh Circuit decision is in conflict with the Eighth and Tenth Circuits. *International Brotherhood of Electrical Workers Local 1439 v. Union Electric Co.*, 761 F.2d 1257, 1258 n.1 (8th Cir. 1985) ("[T]he relevant law for calculating the time period [for filing an age discrimination charge] is the termination of the allegedly unlawful practice."); *Gray v. Phillips Petroleum Co.*, 858 F.2d 610, 614-15 (10th Cir. 1988) ("Where plaintiffs challenged not just one incident or isolated incidents of conduct violative of the ADEA, but an unlawful practice involving several incidents, a charge filed with the EEOC is timely filed when it is filed within 180 days of the termination of the policy and practice adversely affecting plaintiffs.").

This conflict among circuits requires Supreme Court review.

CONCLUSION

Petitioner is not arguing that the Supreme Court needs to revisit and re-analyze the factual determinations by the District and Circuit Courts in this case. To the contrary, the Eleventh Circuit's error was one of law. The Eleventh Circuit's clear error in consciously ignoring highly probative evidence of intent to discriminate on the basis of age, and admissions of a company-wide policy of age discrimination emanating directly from the chief executive officer of the defendant, can only be interpreted as deliberately misreading, ignoring, or directly defying the dictates of the Supreme Court.

The Supreme Court has made clear that artificial barriers to plaintiffs' access to a jury should not be erected. However, the actions of the courts of appeal in general, and the Eleventh Circuit in this case, are equivalent to the poll taxes and literacy tests for voting which were used to prevent access to the constitutional right of voting. Now, the courts are using barriers to prevent constitutional access to juries.

Based on the foregoing, plaintiffs-petitioners respectfully urge this court to grant certiorari, consider the merits, vacate the panel decision and, affirm the judgments entered by the trial court.

Respectfully submitted,

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APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED MAY 29, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-10699
D. C. Docket No. 95-01332-CIV-T-17A

DAVID HIPP, and all others similarly situated;
BRAD STEIN, and all others similarly situated; et al.,

Plaintiffs-Appellees,

versus

LIBERTY NATIONAL LIFE INSURANCE CO.,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(May 29, 2001)

Before BLACK, FAY and COX, Circuit Judges.

PER CURIAM:

This age discrimination appeal requires us to decide several issues concerning application of the "single-filing," or "piggybacking," rule[1] to opt-in collective actions under

1. The "piggybacking," or "single-filing," rule allows plaintiffs who did not file timely charges of discrimination with the Equal (Cont'd)

29 U.S.C. § 216(b). We address these important issues in Part I of this opinion, and we provide a brief summary of our holdings here. We first clarify the meaning of the "similarly situated" requirement under § 216(b). We conclude the similarly situated requirement is not particularly stringent, and we suggest an approach district courts can use to better manage these cases. We next consider the proper temporal scope of § 216(b) collective actions, an issue this Court has not yet directly addressed. As to the proper rearward cutoff date, we conclude in order to properly opt into a § 216(b) action, a plaintiff must allege discriminatory treatment within 180 or 300[2] days before the representative plaintiff's charge is filed with the Equal Employment Opportunity Commission (EEOC). We conclude the proper forward cutoff date is the

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(Cont'd)

Employment Opportunity Commission (EEOC) to "piggyback" onto the timely charge of a named plaintiff. *Grayson v. K-Mart Corp.*, 79 F.3d 1086, 1101 (11th Cir. 1996). We will use the terms "piggybacking" and "single-filing" interchangeably.

2. Whether a plaintiff must allege discriminatory treatment within 180 days or within 300 days depends on whether that plaintiff lives in a "deferral" or "non-deferral" state. Non-deferral states are those without laws banning age discrimination in employment and without state entities authorized to grant or seek relief for victims of age discrimination. *See Grayson*, 79 F.3d at 1100 n.20. Plaintiffs in non-deferral states must file charges of discrimination with the EEOC within 180 days after the allegedly discriminatory acts. *Id.* Deferral states are those with laws banning age discrimination in employment and state entities authorized to seek relief for age discrimination victims. *Id.* at 1100 n.21. In deferral states, putative plaintiffs have 300 days in which to file their EEOC charges, and they "must also have commenced proceedings under state law before filing" civil actions. *Id.* (internal quotation marks and citation omitted).

date of filing of the representative charge. Plaintiffs who do not allege discriminatory treatment occurring during this period may not opt into a § 216(b) action. In other words, a plaintiff must have been able to file his or her charge of discrimination on the date the representative plaintiff filed the representative charge.[3] In Part II of this opinion, we address the sufficiency of the evidence presented in this case.

BACKGROUND & PROCEDURAL HISTORY

This case arises under the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. §§ 621-34, and the Florida Civil Rights Act of 1992 (FCRA), Fla. Stat. Ann. §§ 760.01-760.11. Plaintiffs David Hipp, Harry W. McKown, Jr., and Brad Stein filed their original complaint in Florida state court, alleging Appellant Liberty National Life Insurance Company (Liberty National) engaged in a pattern and practice of age discrimination resulting in Plaintiffs' constructive discharges. These three named Plaintiffs claimed to bring the case on behalf of themselves and others similarly situated.

Liberty National removed the case to the United States District Court for the Middle District of Florida. Plaintiffs amended the complaint to add another named Plaintiff, Mike Stell. Plaintiffs then informed the district court they intended to pursue a collective action under 29 U.S.C. § 216(b). Plaintiffs sought to distribute notice of an opt-in class under § 216(b). Liberty National opposed this motion, maintaining Plaintiffs were not "similarly situated." Liberty National

3. We leave room for a possible exception in certain rare cases. *See infra* note 22 and accompanying text.

further argued that even if Plaintiffs were similarly situated such that a collective action was proper, Plaintiffs' proposed notice was defective because it would allow opt-in by individuals who could not properly piggyback into the case. On February 6, 1996, the district court approved Plaintiffs' proposed notice. *Hipp v. Liberty Nat'l Life Ins. Co.*, 164 F.R.D. 574, 576 (M.D. Fla. Feb. 6, 1996). The district court adopted the following class definition, proposed by Plaintiffs:

> All persons who are, or were, employed by Liberty National Life Insurance Company on or after August 25, 1993, who are, or were, managerial employees, district managers or above, residing in the United States, who were over 40 years of age.

Id. Over twenty individuals eventually filed consents to opt in, although some were untimely.[4]

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4. This appeal concerns the claims of named Plaintiffs Hipp, Stein, and Stell, as well as the claims of four "opt-in" Plaintiffs: Tony Agee, Harold Carter, James Lee, and Blake Tuggle. These seven Plaintiffs prevailed at trial. Named Plaintiff McKown's claim resolved in mediation before trial. Named Plaintiffs Hipp and Stein and opt-in Plaintiffs Lee, Carter, and Tuggle allege they were constructively discharged in violation of ADEA. Opt-in Plaintiff Agee alleges his employment was terminated in violation of ADEA. It is unclear whether named Plaintiff Stell alleges constructive discharge or unlawful termination. He tendered his resignation, effective February 17, 1995, on February 6, 1995. He alleges he was fired February 14, 1995. The Amended Complaint alleges at ¶ 20 that his employment was terminated, but alleges at ¶ 24 that he resigned. The jury's verdict forms treat Stell's claim as one of constructive discharge and award damages on that basis. We will therefore also treat Stell's claim as one of constructive discharge.

Appendix A

After the close of extended discovery, Liberty National sought to sever the cases. Liberty National also filed motions for summary judgment as to the claims of several Plaintiffs. The court substantially denied Liberty National's motions for summary judgment.[5] The court also denied Liberty National's request to certify an interlocutory appeal and its motion to sever the cases.

The claims of ten Plaintiffs were tried before a jury over the course of five weeks beginning June 1, 1998. The jury returned verdicts on July 9, 1998, finding that Liberty National had engaged in a pattern and practice of age discrimination, but returning defense verdicts as to three of the ten Plaintiffs, whose claims are not at issue in this appeal.

The jury's verdicts awarded back pay and ADEA liquidated damages to the seven prevailing Plaintiffs. *Hipp v. Liberty Nat'l Life Ins. Co.*, 65 F. Supp. 2d 1314, 1334-35 (M.D. Fla. 1999); *Hipp v. Liberty Nat'l Life Ins. Co.*, 29 F. Supp. 2d 1314, 1318-19 (M.D. Fla. 1998). Plaintiffs Hipp and Stein received punitive damages and pain and suffering damages under the FCRA, and the jury returned advisory front pay verdicts as to the five prevailing Plaintiffs other than Hipp and Stein. The district court ordered that no Plaintiff should receive front pay because the Plaintiffs' front pay award estimates were too speculative. *Hipp*, 65 F. Supp. 2d at 1336; *Hipp v. Liberty Nat'l Life Ins. Co.*, 39 F. Supp.

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5. The court granted summary judgment to Liberty National on the claims of some opt-in Plaintiffs it determined did not fall within the definition of the class, but these Plaintiffs' claims are not at issue in this appeal. *Hipp v. Liberty Nat'l Life Ins. Co.*, 973 F. Supp. 1033, 1040-41 (M.D. Fla. 1997).

2d 1359, 1361-64 (M.D. Fla. 1999). Furthermore, the district court remitted some of the punitive damages and liquidated damages awarded to Stein and Hipp. *Hipp*, 39 F. Supp. 2d at 1364-65; *Hipp*, 29 F. Supp. 2d at 1335. In all other respects, the court entered judgment in accordance with the jury's verdicts.

Liberty National moved for judgment as a matter of law (JMOL) both during and after trial, and filed motions for remittitur and new trial after entry of judgment. The district court denied Liberty National's motions, except to the extent that it remitted some of the damages. *Hipp*, 65 F. Supp. 2d at 1345.

Liberty National raises the following issues on appeal: (1) the district court erred in permitting a collective action in this case; (2) the district court erred in denying Liberty National's motions for judgment as a matter of law on Plaintiffs' pattern and practice claims; (3) the district court erred in denying Liberty National's motions for judgment as a matter of law on the Plaintiffs' individual claims; (4) the district court erred in denying Liberty National's motions for judgment as a matter of law as to liquidated damages; and (5) the district court erred in denying Liberty National's motion to remit the jury's verdicts.

For the reasons stated in Part I of this opinion, we affirm the district court's judgment on the propriety of a collective action, but we reverse as to the temporal scope of the action. For the reasons stated in Part II, we reverse the pattern and practice finding, and we reverse the verdicts in favor of the individual Plaintiffs. In light of our disposition regarding the verdicts, we need not address Liberty National's arguments pertaining to the damages awarded in this case.

Appendix A

DISCUSSION

I. OPT-IN COLLECTIVE ACTIONS UNDER 29 U.S.C. § 216(b)

A. *Introduction and Background*

Plaintiffs wishing to sue as a class under ADEA must utilize the opt-in class mechanism provided in 29 U.S.C. § 216(b) instead of the opt-out class procedure provided in Fed. R. Civ. P. 23. *See Grayson*, 79 F.3d at 1102 (citing *Price v. Maryland Cas. Co.*, 561 F.2d 609, 610-11 (5th Cir. 1977)).[6] In a Rule 23 class action, each person who falls within the class definition is considered to be a class member and is bound by the judgment, favorable or unfavorable, unless he has opted out. Fed. R. Civ. P. 23(c)(3); *Grayson*, 79 F.3d at 1106. By contrast, a putative plaintiff must affirmatively opt into a § 216(b) action by filing his written consent with the court in order to be considered a class member and be bound by the outcome of the action. § 216(b); *Grayson*, 79 F.3d at 1106; *see also LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288-89 (5th Cir. 1975) (recognizing this "fundamental" difference between Rule 23 class actions and § 216(b) class actions).

To maintain an opt-in class action under § 216(b), plaintiffs must demonstrate that they are "similarly situated." § 216(b); *Grayson*, 79 F.3d at 1093. In subpart B, we will

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6. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

clarify the meaning of § 216(b)'s "similarly situated" requirement in this circuit. We will also suggest an approach for district courts to use in considering certification of ADEA opt-in classes.

This case also requires us to consider application of the piggybacking rule to ADEA opt-in classes under § 216(b). As a general rule, an employee who wishes to sue his employer for age discrimination must first file an administrative charge of discrimination with the EEOC. Under the piggybacking rule, however, a putative plaintiff who has not filed his own EEOC charge may "piggyback" his claim onto the claim of a plaintiff who has filed a timely charge. *Grayson*, 79 F.3d at 1101; *Calloway v. Partners Nat'l Health Plans*, 986 F.2d 446, 450 (11th Cir. 1993). We have specifically held that the piggybacking rule is applicable to ADEA cases. *Grayson*, 79 F.3d at 1101. In so holding, we adopted the two requirements used in Title VII piggybacking cases: A plaintiff may piggyback on another plaintiff's charge provided "'(1) the relied upon charge [to which he is piggybacking] is not invalid, and (2) the individual claims of the filing and non-filing plaintiff [the named filing plaintiff and the piggybacking plaintiff] arise out of similar discriminatory treatment in the same time frame.' " *Id.* at 1101-02 (quoting *Calloway*, 986 F.2d at 450).

The parties agree Plaintiff Stein filed the representative charge in this case, and they agree his charge was valid. They disagree, however, as to the precise meaning of the second requirement, and we must therefore now determine the scope of the statement "in the same time frame." In subpart C, we address the appropriate temporal scope of an ADEA opt-in collective action.

Appendix A

B. *"Similarly situated" requirement*

We first must determine whether Plaintiffs were "similarly situated" as required to create an opt-in class under § 216(b). We review the district court's decision that a collective action was proper because Plaintiffs were similarly situated for abuse of discretion. *See Grayson*, 79 F.3d at 1097; *see also Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1388 (11th Cir. 1998) (en banc).

For an opt-in class to be created under § 216(b), a named plaintiff must be suing on behalf of himself and other "similarly situated" employees.[7] " '[P]laintiffs need show only that their positions are similar, not identical, to the positions held by the putative class members.' " *Grayson*, 79 F.3d at 1096 (quoting *Sperling v. Hoffman-La Roche, Inc.*, 118 F.R.D. 392, 407 (D.N.J. 1988), *aff'd in part and appeal dismissed in part*, 862 F.2d 439 (3d Cir. 1988), *aff'd*, 493 U.S. 165, 110 S. Ct. 482 (1989)).

Liberty National claims the district court should have used a two-tiered approach in making the similarly situated determination. Under this approach, during the early stages of litigation, the district court would have evaluated the case under a lenient standard and likely would have granted

7. "An action . . . may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b).

preliminary certification of an opt-in class. The court would then have re-evaluated the similarly situated question at a later stage, once discovery produced more information regarding the nature of Plaintiffs' claims.

In *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207 (5th Cir. 1995), the Fifth Circuit, while finding it unnecessary to decide which methodology district courts should use in making ADEA class certification decisions, *see id.* at 1216, described the two-tiered approach used by the district court in that case:

> The first determination is made at the so-called "notice stage." At the notice stage, the district court makes a decision — usually based only on the pleadings and any affidavits which have been submitted — whether notice of the action should be given to potential class members.
>
> Because the court has minimal evidence, this determination is made using a fairly lenient standard, and typically results in "conditional certification" of a representative class. If the district court "conditionally certifies" the class, putative class members are given notice and the opportunity to "opt-in." The action proceeds as a representative action throughout discovery.
>
> The second determination is typically precipitated by a motion for "decertification" by the defendant usually filed after discovery is largely complete and the matter is ready for trial. At this stage, the court has much more information

> on which to base its decision, and makes a factual determination on the similarly situated question. If the claimants are similarly situated, the district court allows the representative action to proceed to trial. If the claimants are not similarly situated, the district court decertifies the class, and the opt-in plaintiffs are dismissed without prejudice. The class representatives — i.e. the original plaintiffs — proceed to trial on their individual claims. Based on our review of the case law, no representative class has ever survived the second stage of review.

Id. at 1213-14 (internal footnote omitted).

Liberty National sought to have the district court utilize the two-tiered approach in this case, but the district court declined to do so. If the court had employed this approach, Liberty National contends, the proper result would have been decertification of the class after discovery because of the individualized nature of Plaintiffs' claims. *See, e.g., Thiessen v. Gen. Elec. Capital Corp.*, 996 F. Supp. 1071, 1083 (D. Kan. 1998) (conditionally certifying opt-in class), and *Thiessen v. Gen. Elec. Capital Corp.*, 13 F. Supp. 2d 1131, 1141 (D. Kan. 1998) (decertifying opt-in class and dismissing claims of opt-in plaintiffs); *see also Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 353-54 (D.N.J. 1987) (utilizing two-tiered approach to class certification), *mandamus granted in part, appeal dismissed, Lusardi v. Lechner*, 855 F.2d 1062, 1080 (3d Cir. 1988), *on remand, Lusardi v. Xerox Corp.*, 122 F.R.D. 463, 464 (D.N.J. 1988); *Vaszlavik v. Storage Tech. Corp.*, 175 F.R.D. 672, 678-79 (D. Colo. 1997) (same); *Bayles v.*

Am. Med. Response of Colorado, 950 F. Supp. 1053, 1066-67 (D. Colo. 1996) (same); *Brooks v. Bellsouth Telecomm., Inc.*, 164 F.R.D. 561, 568 (N.D. Ala. 1995) (endorsing the two-tiered approach), *aff'd mem.*, 114 F.3d 1202 (11th Cir. 1997).

After the district court substantially denied Liberty National's motion for summary judgment, Liberty National filed a "Motion for Certification of Interlocutory Appeal of July 28, 1997, Order and Alternate Motion for Reconsideration." Liberty National also filed a motion to sever the cases pursuant to Fed. R. Civ. P. 42(b). The district court denied these motions. In denying the motion to sever, the district court noted that the similarly situated requirement is not very stringent in this circuit.

This Court expressed its view of the similarly situated requirement in *Grayson*: "[T]he 'similarly situated' requirement of § 216(b) is more elastic and less stringent than the requirements found in Rule 20 (joinder) and Rule 42 (severance)." 79 F.3d at 1095. "[A] unified policy, plan, or scheme of discrimination may not be required to satisfy the more liberal 'similarly situated' requirement of § 216(b)." *Id.* "[P]laintiffs bear the burden of demonstrating a reasonable basis for their claim of classwide discrimination. The plaintiffs may meet this burden, which is not heavy, by making substantial allegations of class-wide discrimination, that is, detailed allegations supported by affidavits which successfully engage defendants' affidavits to the contrary." *Id.* at 1097 (internal citations and quotation marks omitted).

The two-tiered approach to certification of § 216(b) opt-in classes described above appears to be an effective tool for district courts to use in managing these often complex

cases, and we suggest that district courts in this circuit adopt it in future cases. Nothing in our circuit precedent, however, requires district courts to utilize this approach. The decision to create an opt-in class under § 216(b), like the decision on class certification under Rule 23, remains soundly within the discretion of the district court. *See Grayson*, 79 F.3d at 1097 (§ 216(b) class); *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1233 (11th Cir. 2000) (Rule 23 class), *cert. denied*, 121 S. Ct. 1354 (2001). It may have been prudent for the district court in this case to have decertified the class upon defendant's motion, but we cannot reverse the decision unless we find the district court abused its discretion.[8] Given the flexibility of the similarly situated requirement under *Grayson*, we cannot find the district court abused its discretion in allowing the opt-in class in this case.

Liberty National emphasizes that Plaintiffs in this case worked in different geographical locations. This factor is not conclusive. The plaintiffs in *Grayson* worked in several states, and the court still held that they met the similarly situated requirement. 79 F.3d at 1091. Liberty National also argues that each Plaintiff's case was unique and required an individual analysis of his or her working conditions. Like the plaintiffs in *Grayson*, however, Plaintiffs in this case all held the same job title, and they all alleged similar, though not identical, discriminatory treatment. *See id.* at 1098-99.

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8. In *Grayson*, the defendant challenged the district court's failure to hold an evidentiary hearing before certifying the class. There we stated that the district court does not abuse its discretion in failing to hold an evidentiary hearing before certifying a class "unless the parties can show that the hearing, if held, would have affected their rights substantially." 79 F.3d at 1099.

C. *Temporal Scope*

We next must determine whether the opt-in Plaintiffs have met the "in the same time frame" requirement such that they can properly piggyback their claims onto Stein's EEOC charge. Specifically, Liberty National claims (1) Plaintiff Lee should have been excluded because he did not fall within the appropriate rearward temporal scope of the action, and (2) Plaintiffs Carter, Tuggle, and Agee should have been excluded because they did not fall within the appropriate forward temporal scope.

At oral argument, Liberty National argued the district court's decisions regarding the temporal scope of the collective action should be reviewed *de novo*. Plaintiffs argue the standard of review is abuse of discretion. We agree with Liberty National that, since the issue is analogous to a statute of limitations issue, the standard of review is *de novo*. *See Atlantic Land & Improvement Co. v. United States*, 790 F.2d 853, 857 (11th Cir. 1986) (noting that district court's application of statute of limitations, as a question of law, is reviewed *de novo*).

1. *Appropriate Rearward Scope*

Liberty National claims Plaintiff Lee should not have been allowed to participate in the opt-in collective action because his claim was time-barred. Plaintiff Lee retired from his position as District Manager in Anniston, Alabama, on December 1, 1993, more than a year before Plaintiff Stein filed the representative charge in this case. Since Alabama is a non-deferral state, Plaintiff Lee had only 180 days from

December 1, 1993, to file a charge of discrimination with the EEOC. Plaintiff Lee did not file a charge, and he could not have filed one on December 9, 1994, the date Plaintiff Stein filed the representative charge in this case.

Liberty National claims *Grayson* established that the rearward scope of an ADEA opt-in action is 180 or 300 days (depending on whether the putative opt-in plaintiff resides in a deferral or a non-deferral state) before the filing of the representative charge. *Grayson* did not, however, establish such a rule. Instead, the *Grayson* plaintiffs conceded such a rearward cut-off date should apply. *See* 79 F.3d at 1101, nn.26-27 and accompanying text.

Liberty National emphasizes the *Grayson* court's statement that misapplication of the piggybacking rule would "virtually eliminate the statute of limitations for opt-in plaintiffs in ADEA actions." 79 F.3d at 1107. We recognize that the Court made this statement in the context of determining that the filing of an opt-in plaintiff's written consent to opt into the action, rather than the filing of the original complaint in the action, serves to toll the statute of limitations on that plaintiff's ADEA claim. The same concept is, however, involved in this case. Here, the concern is that plaintiffs would be able to revive stale claims for which they failed to file EEOC charges. "The purpose of the requirement that a plaintiff file an EEOC charge within 180 days (or 300 days in a deferral state) of the allegedly illegal act or practice is (1) to give the employer prompt notice of the complaint against it, and (2) to give the EEOC sufficient time to attempt the conciliation process before a civil action is filed." *Id.* at 1102-03. While the issue of the proper rearward scope of the

action was not directly before the court in *Grayson*, we believe the rule adopted by the parties in that case is the appropriate one to serve these purposes. We therefore hold the rearward scope of an ADEA opt-in action should be limited to those plaintiffs who allege discriminatory treatment within 180 or 300 days before the representative charge is filed. Plaintiff Lee's claim is procedurally barred because it arose before the "piggybacking window" opened in Alabama, a non-deferral state.[9]

Other courts that have addressed this issue have come to the same conclusion. *See, e.g., McDonald v. United Air Lines, Inc.*, 587 F.2d 357, 361 (7th Cir. 1978) (holding that the rearward scope must be defined by going back 90 days (the then-existing EEOC charge-filing period) from the date

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9. The parties agree Plaintiff Stein's December 9, 1994, charge is the representative charge in this case. Plaintiff Hipp filed his charge on June 23, 1994, but Plaintiffs conceded at oral argument that the district court determined Hipp's charge was timely under the FCRA but untimely under ADEA. *See Hipp*, 39 F. Supp. 2d at 1364 (jury determined Hipp had suffered an adverse employment action within 365 days before his charge, but not within 300 days before it). Plaintiffs do not appeal this finding. At any rate, for purposes of this appeal, it makes no difference whether opt-in Plaintiffs could have piggybacked on Plaintiff Hipp's charge. Plaintiff Lee (who resided in Alabama, a non-deferral state) retired on December 1, 1993. More than 180 days therefore passed between Lee's retirement and the filing of Hipp's charge on June 23, 1994. Put another way, Lee "could not have filed a timely charge" on the date Hipp filed his charge. *Levine*, 700 F. Supp. at 957. Furthermore, we do not believe Hipp's charge was sufficient to alert the EEOC or Liberty National of the class nature of the claims. *See Grayson*, 79 F.3d at 1104-05; *see also infra* text accompanying notes 19-20.

of the earliest-filed charge).[10] In *McDonald*, the Seventh Circuit held that the EEOC and the employer were put on notice by intervening plaintiffs' EEOC charges, which were filed earlier than the named plaintiffs' charges. *See id.* The court left room for the fact that continuing discovery in that case "might turn up a prior EEOC charge, thus resulting in a different tolling date." *Id.* at 361 n.10. The court refused, however, to hold the employer liable for discrimination that occurred before the employer and the EEOC were on notice and could therefore attempt to resolve the issue through conciliation. *See id.* at 360-61; *see also, e.g., Thiessen*, 996 F. Supp. at 1076-77 (holding that "the single-filing rule is properly applied only to those individuals who could have filed timely EEOC charges at the time [the representative plaintiff] actually filed his charge"); *Brooks*, 164 F.R.D. at 570 (same); *Church v. Consol. Freightways, Inc.*, 137 F.R.D. 294, 309 (N.D. Cal. 1991) (same); *Levine v. Lane Bryant*, 700 F. Supp. 949, 957 (N.D. Ill. 1988) (same); *Walker v. Mountain States Tel. & Tel. Co.*, 112 F.R.D. 44, 47 (D. Colo. 1986) (same); *cf. Larkin v. Pullman-Standard Div., Pullman, Inc.*, 854 F.2d 1549, 1562-65 (11th Cir. 1988) (suggesting liability dates from 180 days prior to filing of earliest EEOC charge), *vacated on other grounds sub nom., Pullman-Standard, Inc. v. Swint*, 493 U.S. 929, 110 S. Ct. 316 (1989).

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10. We recognize that *McDonald* is a Title VII case. 587 F.2d at 358. The purposes underlying ADEA and Title VII, specifically their respective requirements that employees file charges of discrimination with the EEOC so that the employer can attempt to resolve the issue through conciliation, are similar. We therefore look to Title VII cases as well as ADEA cases in examining this issue. *Cf. Fountain v. Metcalf, Zima & Co.*, 925 F.2d 1398, 1399 (11th Cir. 1991); *EEOC v. Reno*, 758 F.2d 581, 583-84 (11th Cir. 1985).

Plaintiffs argue even if Plaintiff Lee's claim otherwise falls outside the rearward scope of the class, the continuing violation doctrine revives it. As noted above, it is undisputed that no action was taken against Lee during the charge-filing period. Some cases hold that the continued enforcement of a discriminatory policy against an individual plaintiff constitutes a continuing violation such that the individual plaintiff may sue on otherwise time-barred claims as long as one act of discrimination has occurred against that individual during the statutory period. *See Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1303 (8th Cir. 1997); *Roberts v. North Am. Rockwell Corp.*, 650 F.2d 823, 826-28 (6th Cir. 1981) (in failure-to-hire context, violation was continuing because plaintiff, after being rejected because of her sex, made several more unsuccessful attempts to apply for job). These courts held that claims of discrimination were not time-barred because some acts of discrimination against the individual plaintiffs had occurred within the statutory period, even though prior acts did not. The earlier acts of discrimination were actionable because they were part of a continuing violation. We can find no authority, however, for allowing one plaintiff to revive a stale claim simply because the allegedly discriminatory policy still exists and is being enforced against others. *See, e.g., Woodburn v. LTV Aerospace Corp.*, 531 F.2d 750, 751 (5th Cir. 1976); *Miller v. Int'l Tel. & Tel. Corp.*, 755 F.2d 20, 25 (2d Cir. 1985) ("[S]everal courts have held that an employee who has been discharged pursuant to a discriminatory policy may not take advantage of later discriminatory acts against other employees for the purpose of postponing the running of the statutory period as to him on a continuing violation theory.").

Even if the continuing violation doctrine could be read broadly enough to preserve otherwise stale claims of all class members as long as the illegal policy is being enforced against some members of the class, allowing it to save Plaintiff Lee's claim in this case would contravene the doctrine's purpose. The continuing violation doctrine is premised on "the equitable notion that the statute of limitations ought not to begin to run until facts supportive of the cause of action are or should be apparent to a reasonably prudent person similarly situated." *Alldread v. City of Grenada*, 988 F.2d 1425, 1432 (5th Cir. 1993) (internal quotation marks omitted). This circuit and others have recognized this underlying premise in holding that "[a] claim arising out of an injury which is 'continuing' only because a putative plaintiff knowingly fails to seek relief is exactly the sort of claim that Congress intended to bar by the 180-day limitation period." *Roberts v. Gadsden Mem. Hosp.*, 850 F.2d 1549, 1550 (11th Cir. 1988); *see also Carter v. West Publ'g Co.*, 225 F.3d 1258, 1264 (11th Cir. 2000); *Doe v. R.R. Donnelley & Sons Co.*, 42 F.3d 439, 446 (7th Cir. 1994) ("[T]he purpose of permitting a plaintiff to maintain a cause of action on the continuing violation theory is to permit the inclusion of acts whose character as discriminatory acts was not apparent at the time they occurred.") (citing *Moskowitz v. Trustees of Purdue Univ.*, 5 F.3d 279, 282 (7th Cir. 1993)); *Martin v. Nannie and the Newborns, Inc.*, 3 F.3d 1410, 1415 n.6 (10th Cir. 1993) ("[I]f an event or series of events should have alerted a reasonable person to act to assert his or her rights at the time of the violation, the victim cannot later rely on the continuing violation doctrine to overcome the statutory requirement of filing a charge with the EEOC with respect to that event or series of events."); *Berry v. Bd. of Supervisors*, 715 F.2d 971,

981 (5th Cir. 1983) (In determining whether a continuing violation exists, courts should consider whether "the [alleged discriminatory] act [has] the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate.").

Plaintiff Lee testified he suspected age discrimination when he resigned in 1993. He claimed Regional Vice President Andy King was harassing him and making age-based comments, and Lee felt he was being forced to retire. During his direct examination at trial, Lee testified that, at the time he left the company, he felt King's harassment was based on Lee's age.[11] The *Gadsden Memorial* rationale therefore applies here, and Lee may not rely on the continuing violation doctrine to revive his stale claim of age discrimination.[12] Plaintiff Lee should not have been permitted

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11. At oral argument, counsel for Plaintiffs argued Lee did not "put two and two together" and realize he had been discriminated against until several months after he left the company. In light of the fact that Lee testified that King told him he needed to retire because he was too old, it is difficult to believe Lee did not suspect age discrimination at the time he retired.

12. In *Gadsden Memorial*, the individual plaintiff was trying to revive an old claim by asserting that it was sufficiently connected to a timely action as to constitute a continuing violation. 850 F.2d at 1550. We held that since the plaintiff had slept on his rights, he could not revive the old claim, regardless of its connection to the timely claim. Like *Gadsden Memorial*, most cases involving continuing

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to opt into this action, and the jury verdict in his favor must be reversed.[13]

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violations involve claims of discrimination against the same individual, not another member of the class. Even the cases cited by Plaintiffs do not support such a broad reading of the continuing violation theory. *See, e.g., Gray v. Phillips Petroleum Co.*, 858 F.2d 610, 614 (10th Cir. 1988). In *Gray*, the Tenth Circuit held that where an employee continues to be affected by a discriminatory policy but fails to file a charge because he fears reprisal by his employer, the continuing violation doctrine allows him to file a charge encompassing otherwise untimely claims. *Id.* The court further held, however, that once an employee leaves the company, he must comply with the charge-filing period, and the continuing violation doctrine will no longer save a late claim:

> Once an employee is terminated, . . . he must file a charge with the EEOC within 180 days of his termination; otherwise, his ADEA action will be time barred. When an employee is terminated, the employment relationship ends; and the fear of reprisal and the reasons for allowing employees to claim a continuing discriminatory policy are removed. *Moreover, if former employees were allowed to assert charges after 180 days had passed from the date of termination, the purpose of the statute of limitations would be undermined and employers could be exposed to unlimited suits.*

Id. (emphasis added).

13. Plaintiffs also assert Lee's claim should be saved by equitable tolling because Liberty National deceived Lee as to its discriminatory purpose. Since Lee suspected age discrimination at the time he resigned, equitable tolling cannot apply to save his claim.
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Appendix A

2. Appropriate Forward Scope

Liberty National argues Plaintiffs Carter, Tuggle, and Agee should not have been allowed to opt into the action because their claims arose after the forward scope of the action should have been cut off.

Plaintiff Carter was District Manager in Roanoke, Alabama, until July 1994, when he took medical leave. At that point, he was replaced by Plaintiff Agee, who was older than Carter. One year later, Carter expressed interest in returning to his position, but Agee was still District Manager.[14] Liberty National reassigned Carter to a sales manager position in Opelika, Alabama, and Carter resigned. Carter did not file a charge of age discrimination with the EEOC, and he could not have filed one on December 9, 1994, the date Plaintiff Stein filed the representative charge in this case.

Plaintiff Agee was fired from his position as District Manager in Roanoke, Alabama, in June 1996.[15] Agee did not

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See Turlington v. Atlanta Gas Light Co., 135 F.3d 1428, 1435-36 (11th Cir. 1998) (suggesting equitable tolling might apply if a claimant has no reason to believe he has been the victim of unlawful employment discrimination, but finding the plaintiff in that case knew he was the victim of discrimination).

14. On September 22, 1994, Agee wrote a letter to Regional Vice Presidents Steve Sexton and Andy King, stating Carter had badly mismanaged the district.

15. Liberty National alleges Agee was fired for issuing a receipt on the back of a business card, in violation of company policies.

file a charge of discrimination with the EEOC, and he could not have filed one on December 9, 1994.

Plaintiff Tuggle resigned from his position as District Manager in Tullahoma, Tennessee, in December 1995, at age 43. Tuggle was replaced by Donnie Ventress, who was older than Tuggle. Tuggle did not file a charge of age discrimination with the EEOC, and he could not have filed one on December 9, 1994.

Liberty National claims the forward scope of this action should have been cut off on the day Stein (the representative plaintiff) left Liberty National. In the alternative, Liberty National contends the forward scope should have been cut off on the day Stein filed the representative charge, or, at the latest, on the day the complaint was filed in this case. Plaintiff Stein resigned from Liberty National on July 29, 1994, and he filed his EEOC charge on December 9, 1994. The original complaint in this case was filed on June 22, 1995, and the amended complaint was filed on October 5, 1995. Plaintiff Carter resigned from Liberty National in July 1995; Plaintiff Tuggle resigned in December 1995; and Plaintiff Agee's employment was terminated in June 1996. Under Liberty National's theory, then, all three of these Plaintiffs should have been barred from joining the collective action.

Liberty National relies on *Jones v. Firestone Tire & Rubber Co.*, 977 F.2d 527, 532 (11th Cir. 1992), a Title VII case in which this Court recited the district court's decision that the representative charge could be relied on by non-filing plaintiffs whose claims arose between the date 180 days before the representative charge was filed and the date of the

representative plaintiff's departure from the company. *See id.* at 532. The temporal scope of that case was not, however, an issue in the appeal. This Court therefore had no occasion to pass on the correctness of the district court's decision in that respect. *See id.*[16]

Liberty National argues that if the piggybacking window did not close the day Stein left the company, it closed the day he filed his EEOC charge. Liberty National finds support for this position in *Grayson*. In finding plaintiff Grayson's EEOC charge could not be the representative charge in that case, the Court noted that Grayson's charge did "*not* put the EEOC on notice of demotions occurring *after* [its] filing." *Grayson*, 79 F.3d at 1104.[17] The Court noted that if Grayson's charge were used as the representative charge, putative plaintiffs demoted after the date it was filed could not opt into the class. *See id.*[18] This language suggests the Court

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16. We note the tone of the opinion suggests the Court found the district court's decision reasonable, and perhaps even assumed it to be correct.

17. The Court's primary reason for finding Grayson's charge inadequate was that Grayson's own action was time-barred, so he should not have been allowed to participate in the action. Since he should not have been involved in the action, his charge could not serve as the representative charge for other plaintiffs. *Grayson*, 79 F.3d at 1104.

18. Despite the fact that the appeal bore *Grayson*'s name, Grayson himself was an opt-in plaintiff, not a named plaintiff. 79 F.3d at 1092. The district court dismissed *Grayson*'s original complaint, noting that all plaintiffs in that case were also members

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would have considered plaintiffs who were demoted after Grayson was demoted, but before Grayson filed his EEOC charge, able to opt in, undermining Liberty National's argument that the cut-off date is the date the representative plaintiff leaves the company. It also, however, strongly suggests the Court agreed with Liberty National's alternative argument that the forward scope of the opt-in class should be cut off on the date the representative charge was filed.

The Court in *Grayson* went on to select the charge of plaintiff Kempton, which was "the first timely filed charge of one of the named plaintiffs that gives adequate notice of the scope of the class." *Id.* at 1104-05.[19] *See also Walker*, 112 F.R.D. at 47 ("The latest date on which potential plaintiffs may claim discrimination occurred is also circumscribed by [the representative] charge. . . . The EEOC could not have been expected to perform its conciliatory function for alleged acts of discrimination which could have occurred long after

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of the class in a separate action, *Helton*. *Id.* The district court assumed the *Grayson* plaintiffs would want to opt into the *Helton* action, and provided that their cases could be re-opened if they were later excluded from the *Helton* class. *Id.* The class at issue in the *Grayson* appeal was actually the *Helton* class, in which Grayson was an opt-in, not a named, plaintiff. *Id.*

19. Before trial in this case, the district court found Hipp's charge to be timely. *Hipp*, 973 F. Supp. at 1038. Liberty National claims it was untimely, and Plaintiffs conceded at oral argument that it was untimely under ADEA, but timely under the FCRA. Regardless of its timeliness, Hipp's charge did not put the EEOC and Liberty National on notice of the collective nature of the claims, so it cannot serve as the representative charge.

[the representative] charge was filed and of which no notice was given."); *Griffin v. Casey*, 42 Fair Empl. Prac. Cas. (BNA) 1423, 1429 (M.D. Fla. Jan. 20, 1987) ("[T]he fact that the present case involves a class action should not expand the temporal scope of the claims that would otherwise be heard if Griffin had litigated alone.").

While the issue was not squarely before this Court in *Grayson*, our statement as to the inadequacy of Grayson's charge[20] supports the view that the forward scope of an opt-

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20. We find no material basis on which to distinguish Stein's charge from Grayson's. In *Grayson*, plaintiff Grayson's charge made the following allegations:

> For the past five years, the Company has systematically [retired or] demoted managers in the protected age group and replaced them with younger managers.

79 F.3d at 1104.

In this case, Plaintiff Stein's charge makes the following allegations:

> I believe Liberty National, C.B. Hudson and Andy King have violated my rights, as well as the rights of both older workers and applicants, under the Age Discrimination in Employment Act and the Florida Civil Rights Act of 1992. Liberty National, C.B. Hudson and Andy King have implemented a uniform practice and policy of age discrimination by forcing older employees to retire, take demotions, terminating them, and/or subjecting them to continued harassment, abuse, and discriminatory policies and practices.

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in class ends on the date the representative charge is filed. We agree that this rule is the proper one, and we adopt it today. This rule is consistent with the purposes of requiring putative ADEA plaintiffs to file charges with the EEOC. As stated above, the charge-filing requirement is designed to put the EEOC and the employer on notice of the allegations. The objective of the piggybacking rule is to allow non-filing plaintiffs to rely on the charges of filing plaintiffs when it would be a "useless act" for the non-filing plaintiffs to file their own charges. *Grayson*, 79 F.3d at 1103 (internal quotation marks omitted). It is not, however, "useless" for plaintiffs with claims arising after the representative charge is filed to file their own charges. On the contrary, such filing is necessary to remain faithful to the overriding purpose of the charge-filing requirement: notifying employers and the EEOC of the allegations in a timely manner.

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Both charges alleged that other employees were affected by the policies. Grayson's charge alleged that older managers had been "systematically" discriminated against, while Stein's alleged "a uniform practice and policy of age discrimination." Stein's charge, like Grayson's, did not explicitly allege that the violation was continuing. (While Stein's charge did allege "continued harassment," we read that allegation to mean the "harassment" was "continued" during Stein's employment, not that it was "continuing" after Stein left Liberty National). Stein's charge also did not explicitly allege that the policy ended on the day his employment ended (or on the day he filed the charge), but neither did Grayson's, and the Court there believed it was inadequate to notify the EEOC of discrimination occurring after the charge was filed. *Grayson*, 79 F.3d at 1104. If opt-in plaintiffs whose claims arose after Grayson's charge was filed could not opt in on the basis of his charge, we do not see how opt-in plaintiffs whose claims arose after Stein's charge was filed could properly opt in on the basis of Stein's charge.

Appendix A

Plaintiffs allege the claims of Carter, Tuggle, and Agee "related to and grew out of" the allegations in Stein's EEOC charge, and these Plaintiffs therefore should have been allowed to opt into this action under a continuing violation theory. Indeed, there is some authority supporting this position. *See, e.g., McDonald*, 587 F.2d at 361 (permitting opt-in of plaintiffs discharged after representative charges were filed but before discriminatory rule was abolished); *Church*, 137 F.R.D. at 309 (The rule that "the latest date upon which a potential class member must have been able to file is defined by the date of the last filed EEOC charge" does not apply "where acts of ongoing discrimination in furtherance of an earlier implemented plan are alleged."); *Levine*, 700 F. Supp. at 957 (representative charge "put [the employer] on notice that someone was challenging its alleged age discrimination"). Most of the cases Plaintiffs cite, however, do not establish that one plaintiff may opt into an action because his claims of discrimination relate to allegations made in an EEOC charge filed by another plaintiff. *See Turner v. Orr*, 804 F.2d 1223, 1226 (11th Cir. 1986) (Title VII complaint may allege incidents that occurred during the pendency of an EEOC charge if the incidents could reasonably be expected to "grow out of" the allegations in the charge); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 465-67 (5th Cir. 1970) (same). It makes sense to allow an individual plaintiff to include in his complaint allegations of conduct occurring after the representative charge is filed, as long as that conduct relates to the conduct alleged in the charge. For example, in *Turner*, the plaintiff's EEOC charge generally alleged the company had failed to promote him, and he wanted to include in his complaint allegations that he had not received a specific promotion. 804 F.2d at 1226-27.

In such a case, the EEOC and the employer can reasonably be expected to be on notice that the plaintiff will challenge the employment decision. Here, however, the actions about which Carter, Lee, and Tuggle complained occurred well after Stein filed his charge. A single charge cannot be expected to put the EEOC and employer on notice that general policies as applied to different individuals in different offices are being challenged indefinitely.[21]

Where the representative charge clearly alleges a continuing, concrete policy that is illegal, as in *McDonald*, it might be fair to assume the company has knowledge of later-arising claims challenging the same policy. *See, e.g.*, *Bush v. Liberty Nat'l Life Ins. Co.*, 12 F. Supp. 2d 1251, 1258-59 n.11 (M.D. Ala. 1998), *aff'd mem.*, 196 F.3d 1261 (11th Cir. 1999) (continuing violation must be "clearly asserted both in the EEOC filing and in the complaint") (quoting *Miller v. Int'l Tel. & Tel. Corp.*, 755 F.2d 20, 25 (2d Cir. 1985)). Since we are not faced with such a case, we need not decide that more difficult issue today.[22]

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21. Stein's charge alleges that a rather nebulous practice and policy of harassment was implemented by Hudson and King. The testimony centered around King's behavior, and the district court found King "predominantly carried out the harassment." *Hipp*, 29 F. Supp. 2d at 1317. King apparently left the company in early 1995. Plaintiff Carter resigned in July 1995; Plaintiff Tuggle resigned in December 1995; and Plaintiff Agee's employment was terminated in June 1996. Based on these facts, even if we were to accept Plaintiffs' "relate to and grow out of" theory, it is uncertain whether these claims would qualify.

22. In *McDonald*, the defendant, United, had an explicit discriminatory policy: a no-marriage rule for flight attendants. (Cont'd)

Appendix A

The forward cut-off date in this case should have been December 9, 1994, the date Plaintiff Stein filed his charge. Plaintiffs Carter, Tuggle, and Agee should not have been permitted to opt into this action. The jury verdicts in favor of these three Plaintiffs must therefore be reversed.[23]

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587 F.2d at 358. It was certainly reasonable to expect United to be on notice, from the filing of the first charge, that it could expect flight attendants to continue challenging the policy until the policy was withdrawn. In such a case, it may well be futile to require putative plaintiffs to file repetitive charges challenging the same well-defined plan. "The principle behind the piggybacking rule is to give effect to the remedial purposes of the ADEA and to not exclude otherwise suitable plaintiffs from an ADEA class action simply because they have not performed the 'useless act of filing a charge.' " *Grayson*, 79 F.3d at 1103 (citations omitted). We think the act of filing a charge, though, can only be said to be "useless" when the charge on which a plaintiff purports to rely clearly puts the EEOC and the employer on notice that the plaintiff is likely to assert a claim. Such can certainly be said of the *McDonald* plaintiffs whose claims arose after the first EEOC charge was filed. They were challenging precisely the same concrete policy that had already been brought to the attention of United and the EEOC. *McDonald*, 587 F.2d at 358.

We recognize that in such cases the line between the "similar discriminatory treatment" and "in the same time frame" requirements becomes somewhat blurred. When plaintiffs so clearly meet the "similar discriminatory treatment" requirement, as in *McDonald*, courts can afford to be somewhat more lenient with respect to the "in the same time frame" requirement, without sacrificing fairness to the employer.

23. Liberty National also claims the subject matter of the opt-in class should have been limited to constructive discharge because Stein's EEOC charge alleged only constructive discharge. Plaintiff (Cont'd)

Appendix A

II. SUFFICIENCY OF THE EVIDENCE AS TO PLAINTIFFS HIPP, STELL, AND STEIN[24]

Liberty National argues Plaintiffs presented insufficient evidence of a pattern and practice of age discrimination. Liberty National further argues the district court should have granted its motion for judgment as a matter of law (JMOL) on each Plaintiff's claims of age discrimination. We will first address the pattern and practice evidence, and we will then address the Plaintiffs' individual claims. We conclude the case should not have been allowed to proceed as a pattern and practice case. We further conclude the jury verdicts in favor of the individual Plaintiffs must be reversed because they presented insufficient evidence of constructive discharge in violation of ADEA.

A. *Sufficiency of Pattern and Practice Evidence*

Plaintiffs in this case proceeded under a pattern and practice theory of intentional discrimination.[25] *See generally*

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Agee is the only plaintiff involved in this appeal who does not allege constructive discharge; Agee alleges unlawful termination. Since we hold Agee should not have been allowed to participate in the action because his claim fell outside the proper temporal scope of the class, we need not address this issue.

24. It is unnecessary for us to consider Liberty National's arguments regarding the claims of Plaintiffs Lee, Carter, Agee, and Tuggle, as we have already found those Plaintiffs should not have been allowed to opt into this action.

25. The verdict forms required the jury to find whether Liberty National had engaged in a pattern and practice of age discrimination.
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EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1286 (11th Cir. 2000). In a pattern and practice case, plaintiffs must establish by a preponderance of the evidence not only that the employer discriminated against certain individuals, but that "discrimination was the company's standard operating procedure — the regular rather than the unusual practice." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336, 97 S. Ct. 1843, 1855 (1977). To meet this burden, plaintiffs must "prove more than the mere occurrence of isolated or accidental or sporadic discriminatory acts." *Id.* (internal quotation marks omitted); *Maddox v. Claytor*, 764 F.2d 1539, 1556-57 (11th Cir. 1985).[26] When plaintiffs successfully establish a pattern and practice of employment discrimination, a rebuttable presumption that each plaintiff was a victim of discrimination obtains, and the burden shifts to the employer to prove that each individual employment decision was not made in furtherance of its illegal policy. *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1559 (11th Cir. 1986) (citing *Teamsters*, 431 U.S. at 359, 97 S. Ct. at 1866). The employer may meet this burden with "clear and convincing evidence that job decisions made when the discriminatory policy was in force were not made in pursuit

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The jury answered "yes." The verdict forms also required the jury to find on an individual basis whether "each plaintiff prove[d] by a preponderance of the evidence that he suffered a tangible job detriment, such as discharge, constructive discharge, demotion or loss of substantial job benefits." The jury answered "yes" as to Hipp, Stell, and Stein.

26. Plaintiffs need not, however, establish that the employer followed "a *formal* or *express* policy of discrimination." *Joe's Stone Crab*, 220 F.3d at 1285.

of that policy." *Id.* (citing *Teamsters*, 431 U.S. at 362, 97 S. Ct. at 1868).

The jury in this case found by a preponderance of the evidence that Liberty National engaged in a pattern and practice of age discrimination. The jury further found that Liberty National did not prove it operated outside the pattern and practice with respect to each of the prevailing Plaintiffs.[27] The jury also found that each prevailing Plaintiff had "suffered a tangible job detriment, such as discharge, constructive discharge, demotion or loss of substantial job benefits."

Plaintiffs proceeding under a pattern and practice theory often introduce statistics to bolster their claims of discrimination. *See, e.g.*, *Teamsters*, 431 U.S. at 339-40, 97 S. Ct. at 1856-57; *Maddox*, 764 F.2d at 1556; *Coates v. Johnson & Johnson*, 756 F.2d 524, 532 (7th Cir. 1985); *In re W. Dist. Xerox Litig.*, 850 F. Supp. 1079, 1084-85 (W.D.N.Y. 1994). Plaintiffs in this case did not introduce statistical evidence at trial.[28] Liberty National urges us to hold Plaintiffs'

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27. The jury found Liberty National did demonstrate it operated outside the pattern and practice as to the three Plaintiffs who did not prevail at trial.

28. Plaintiffs claim they were prepared to introduce statistical evidence based on one of Liberty National's exhibits, but Liberty National withdrew the exhibit. After trial, the district court faulted Liberty National for Plaintiffs' lack of statistical evidence. *Hipp*, 65 F. Supp. 2d at 1327. Liberty National claims Plaintiffs failed to produce their own statistical analysis and argues it should not be faulted for that failure.

pattern and practice evidence insufficient as a matter of law because Plaintiffs failed to provide statistical evidence to support their claims. While we note that statistical evidence is often extremely useful, we decline to announce the broad rule Liberty National requests. *See, e.g., Xerox*, 850 F. Supp. at 1085 (the absence of statistical evidence is not always fatal in pattern and practice cases, but when either statistical evidence or anecdotal "evidence is missing altogether, the other must be correspondingly stronger").

We nevertheless do not think this case should have been allowed to proceed as a pattern and practice case. Even assuming the truth of all their allegations, Plaintiffs did not prove that age discrimination was the "standard operating procedure" of the company regarding retention of District Managers. While the absence of statistical evidence is not necessarily fatal to Plaintiffs' claims, they presented only vague allegations of a policy of forcing out older District Managers.

Plaintiffs argue on appeal that the evidence at trial showed that "Liberty National's discriminatory policies emanated from its chief executive officer and were uniformly enforced by the company's regional vice presidents. Liberty National's top executives employed a standardized set of harassing tactics and techniques." Plaintiffs' evidence at trial did not, however, show such a widespread pattern of discrimination.[29] Rather, Plaintiffs alleged an amorphous "policy" that was mainly implemented by one man, Andy King.

29. We note that part of the problem in this case is that the pattern and practice framework is inherently ill-suited to cases in which plaintiffs allege constructive discharge. In most pattern and (Cont'd)

Plaintiff Hipp testified he noticed a pattern of older District Managers leaving the company. He did not, however, know how many District Managers over age 40 remained at Liberty National, and he did not know whether the average age of District Managers had increased or decreased since the alleged policy began. Plaintiff Stell testified he would have stayed at Liberty National if he had been transferred out of King's division. This testimony indicates age discrimination was not Liberty National's "standard operating procedure." Rather, if age discrimination existed at all with respect to the treatment of District Managers, it was apparently confined to King's division.[30]

(Cont'd)
practice cases, plaintiffs challenge the employer's failure to hire or promote employees of a certain class. *See, e.g., Teamsters*, 431 U.S. at 328-29, 97 S. Ct. at 1851 (discriminatory hiring practices); *Cox*, 784 F.2d at 1551-52 (failure to promote; job classification on the basis of gender; wage discrimination). In such cases, the individual employees generally present very similar claims, and they can often point to either a written policy or strong statistical evidence that supports their position. In constructive discharge and hostile environment cases, by contrast, plaintiffs often rely on individualized actions taken against them. Many of the actions about which Plaintiffs complain are individualized. *See discussion infra* II.B. While it might in some other case be appropriate to conclude an employer engaged in a "pattern and practice" of forcing out employees of a certain class, it is not appropriate here, where each Plaintiff relies heavily on individualized and personalized "harassment."

30. Viewing the evidence in the light most favorable to Plaintiffs, it appears Plaintiffs may have proven it is Liberty National's standard operating procedure to discriminate against older applicants for positions as agents. There was substantial testimony at trial that
(Cont'd)

Based on these facts, we conclude Plaintiffs presented insufficient evidence of a pattern and practice of age discrimination.

(Cont'd)
Liberty National subjected applications from individuals over age 55 for positions as agents to additional scrutiny. (There was some confusion in the testimony as to whether the policy applied to applicants over 55 or applicants over 60). Plaintiffs argue on appeal that the discriminatory hiring policy bolsters their pattern and practice claim. The district court accepted this argument. We do not see, however, how that alleged policy has any relationship to Plaintiffs' claims. That policy, if it existed, concerned *applicants* who were *over age 55* and who applied for jobs as *agents*. Plaintiffs were not subjected to that policy. They were *already employed by Liberty National*. Furthermore, they were all *in their early 40s*, and they worked as *District Managers*. They do not claim Liberty National refused to hire them. Instead, they claim they were constructively discharged from their positions. Further, they do not argue that only District Managers who were over 40 were prohibited from hiring agents over age 55. The policy apparently applied across the board. While it was certainly a deplorable policy to refuse to hire agents over age 55, it simply is not probative of a plan on the part of Liberty National to force out District Managers in their early 40s. We also cannot accept Plaintiffs' allegation that this policy created a hostile working environment for all employees over age 40. So holding would mean, in effect, that age discrimination against one employee would give all other employees over 40 a cause of action. ADEA was not meant to be so expansive.

Appendix A

B. *Individual Constructive Discharge Claims*[31]

In reviewing the denial of a motion for JMOL, this Court uses the following standard:

> When considering whether or not a ruling on a motion for directed verdict or for judgment notwithstanding the verdict should be upheld, the standard of review to be applied by this Court is the same as that applied by the district court. Thus, we consider all the evidence, and the inferences drawn therefrom, in the light most favorable to the nonmoving party. If the facts and inferences point overwhelmingly in favor of one party, such that reasonable people could not arrive at a contrary verdict, then the motion was properly granted. Conversely, if there is substantial evidence opposed to the motion such that reasonable people, in the exercise of impartial judgment, might reach differing conclusions, then such a motion was due to be denied and the case was properly submitted to the jury.
>
> It bears repeating that a mere scintilla of evidence does not create a jury question. Motions for directed verdict and for judgment

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31. The same discussion applies both to Plaintiffs' claims under ADEA and Plaintiffs' claims under the FCRA. *See Zaben v. Air Prods. & Chems., Inc.*, 129 F.3d 1453, 1455 n.2 (11th Cir. 1997) (noting that we consider age discrimination claims under FCRA within the same framework used to consider age discrimination claims under ADEA).

> notwithstanding the verdict need not be reserved for situations where there is a complete absence of facts to support a jury verdict. Rather, there must be a substantial conflict in evidence to support a jury question.

Carter v. City of Miami, 870 F.2d 578, 581 (11th Cir. 1989) (footnotes omitted).[32]

Plaintiffs allege they were constructively discharged in violation of ADEA.[33] The fact that we have found Plaintiffs' evidence insufficient as a matter of law to establish a pattern and practice of discrimination does not necessarily mean Plaintiffs are not entitled to relief on their individual claims. *Cf. Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876-78, 104 S. Ct. 2794, 2799-2800 (1984) (judgment in class action that employer had not engaged in pattern and practice of discrimination did not preclude filing of separate individual actions by class members). We will therefore examine Plaintiffs' individual constructive discharge claims.

"[T]he plaintiff in an employment discrimination lawsuit always has the burden of demonstrating that, more probably than not, the employer took an adverse employment action

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32. Fed. R. Civ. P. 50(b) has been amended to substitute the term "judgment as a matter of law" for the terms "directed verdict" and "judgment notwithstanding the verdict."

33. As noted above, Plaintiff Stell apparently alleges both constructive discharge and unlawful termination. Since the district court analyzed his claim as one of constructive discharge, we will do the same.

against him on the basis of a protected personal characteristic." *Wright v. Southland Corp.*, 187 F.3d 1287, 1292 (11th Cir. 1999).[34] *See also Benson v. Tocco, Inc.*, 113 F.3d 1203, 1207-08 (11th Cir. 1997); *Poole v. Country Club of Columbus, Inc.*, 129 F.3d 551, 553 n.2 (11th Cir. 1997). We have long recognized that constructive discharge can qualify as an adverse employment decision under ADEA. *See Poole*, 129 F.3d at 553 n.2; *Maddow v. Procter & Gamble*, 107 F.3d 846, 852 (11th Cir. 1997); *Stamey v. Southern Bell Tel. & Tel. Co.*, 859 F.2d 855, 859-60 (11th Cir. 1988). The jury in this case found that Plaintiffs were constructively discharged in violation of ADEA.[35] The district court denied

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34. The plaintiff must show that an adverse employment action was taken against him regardless of whether he is relying on direct evidence of discrimination or employing the burden-shifting approach established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), for cases in which only circumstantial evidence is available. *See Wright*, 187 F.3d at 1292.

35. As to Plaintiffs Hipp and Stein, the jury's special verdict forms contained the following findings, made pursuant to the preponderance of the evidence standard:

> (1) Plaintiffs proved they suffered adverse employment actions and age was a determining factor in those actions.
>
> (2) Plaintiffs proved they were subjected to hostile work environments due to their ages.
>
> (3) Plaintiffs proved age was a determining factor in the work conditions imposed on them.

(Cont'd)

Liberty National's motion for JMOL on this issue, and Liberty National appeals this denial.

The threshold for establishing constructive discharge in violation of ADEA is quite high. In evaluating constructive discharge claims, we do not consider the plaintiff's subjective

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(Cont'd)

> (4) Plaintiffs proved their working conditions were so intolerable that reasonable people in their places would have felt compelled to resign.
>
> (5) Liberty National did not prove it would have treated Plaintiffs the same way if age had not been a factor.

The special verdict form for Plaintiff Stell contained the following findings, made pursuant to the preponderance of the evidence standard:

> (1) Plaintiff proved his age was a determining factor in the work conditions imposed on him.
>
> (2) Plaintiff proved he was subjected to a hostile working environment due to his age.
>
> (3) Plaintiff proved his working conditions were so intolerable that a reasonable person in his place would have felt compelled to resign.
>
> (4) Liberty National did not prove it would have treated Plaintiff the same way if age had not been a factor.
>
> (5) Liberty National did not prove Plaintiff unreasonably refused an unconditional offer of full reinstatement and back pay.

feelings. Instead, we employ an objective standard. *Doe v. Dekalb County Sch. Dist.*, 145 F.3d 1441, 1450 (11th Cir. 1998). "To successfully claim constructive discharge, a plaintiff must demonstrate that working conditions were 'so intolerable that a reasonable person in [his] position would have been compelled to resign.' " *Poole*, 129 F.3d at 553 (quoting *Thomas v. Dillard Dep't Stores, Inc.*, 116 F.3d 1432, 1433-34 (11th Cir. 1997)).

The standard for proving constructive discharge is higher than the standard for proving a hostile work environment. *Landgraf v. USI Film Prods.*, 968 F.2d 427, 430 (5th Cir. 1992) ("To prove constructive discharge, the plaintiff must demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove a hostile working environment."), *aff'd*, 511 U.S. 244, 114 S. Ct. 1483 (1994); *see also Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316-18 (11th Cir. 1989) (affirming district court's conclusion that Title VII plaintiffs were subjected to hostile work environment, but were not constructively discharged); *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 905-06 (11th Cir. 1988) (same).

This circuit has required pervasive conduct by employers before finding that a hostile work environment existed or a constructive discharge occurred. *See, e.g., Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1247 (11th Cir. 1999) (en banc) (no sex-based hostile work environment where male supervisor (1) told female employee he was "getting fired up;" (2) rubbed his hip against employee's hip while smiling and touching her shoulder; (3) twice made a sniffing sound while looking at employee's groin area; and (4) constantly

followed employee and stared at her in a very obvious manner), *cert. denied*, 529 U.S. 1068, 120 S. Ct. 1674 (2000); *Poole*, 129 F.3d at 553 (issue of fact existed, precluding summary judgment for employer on constructive discharge claim, where plaintiff was "[s]tripped of all responsibility, given only a chair and no desk, and isolated from conversations with other workers"); *EEOC v. Massey Yardley Chrysler Plymouth*, 117 F.3d 1244, 1247-48 and nn.2 and 4 (11th Cir. 1997) (affirming jury finding of age-based hostile work environment and constructive discharge where supervisors (1) made offensive comments regarding effects of aging on plaintiff's body; (2) told her she was too old for the clothes she was wearing and should wear "old lady dresses" instead; (3) asked if she was "having any hot flashes;" (4) remarked that she was becoming "senile" or "losing it," and asked "whether Alzheimer's disease was setting in early;" (5) told her she would "just have to get used to" these comments since she "was, after all, 'an old lady' "); *Morgan v. Ford*, 6 F.3d 750, 752, 756 (11th Cir. 1993) (issue of fact as to sex-based constructive discharge where plaintiff's supervisor (1) repeatedly asked her out on dates; (2) constantly "hovered" around her after she turned him down; (3) told her she "had not had a real man until she had him;" (4) made offensive, sexually charged comments; and (5) electronically monitored her conversation); *Hill v. Winn-Dixie Stores*, 934 F.2d 1518, 1527 (11th Cir. 1991) (affirming district court's grant of judgment notwithstanding the verdict because evidence of reprimands, criticism, and supervisor's withdrawal of support was insufficient to prove constructive discharge, especially in light of employer's efforts to remedy the situation after plaintiff's resignation); *Wardwell v. Sch. Bd. of Palm Beach County*, 786 F.2d 1554,

1557-58 (11th Cir. 1986) (reversing as clearly erroneous the district court's finding of sex-based constructive discharge where female plaintiff was passed over for promotion in favor of less experienced male and was assigned extra duties).[36]

Plaintiff Hipp

Plaintiff Hipp was District Manager in Ft. Myers, Florida, before he resigned in August 1993 at age 43. On June 23, 1994, Hipp filed an individual charge of discrimination with the Florida Commission on Human Relations (FCHR). This charge alleged he was forced to resign because of his age.[37]

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36. In *Wardwell*, the Court stated, "Although there is evidence to support the district court's finding of constructive discharge, because our review of the evidence leaves us with the definite and firm conviction that no reasonable person in Wardwell's position would have felt compelled to resign, we hold that the district court's finding that Wardwell had been constructively discharged is clearly erroneous." 786 F.2d at 1557.

37. Plaintiff Hipp made the following allegations in his charge:

> I was employed by Liberty National Insurance Company from 1-16-78 until I resigned on 08-31-93. As a result of management's desire to have younger management, I was subjected to continuous harassment and felt forced to resign. My job as district manager and the performance of my duties were made miserable by Andy King (Second Vice-President) so that I would be forced to resign. I endured changes in policies and procedures and constant harassment and criticism by Mr. King.

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At trial, he testified that Regional Vice President Andy King, and, to a lesser extent, Regional Vice President Don Horton, harassed him until he felt he had no choice but to resign.[38] He said the criticism he received prior to 1991 was constructive and helpful, but after 1991, "it was nothing but harassment."

Hipp testified that Liberty National's C.E.O., C.B. Hudson, said on at least one occasion that "older people are harder to get to change," and that King and Horton made similar statements.[39] Hipp did not allege King and Horton

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(Cont'd)

> I was replaced by a 29-year old with only five years' experience. His district is at the bottom of the company (and has been since he became district manager) in terms of productivity.
>
> I was told by Andy King that I was not to send in applications for individuals over 60-years old.
>
> Patty Herring, Human Resources, returned an applicant's file to me because the applicant was a diabetic. According to Ms. Herring, management would not look at the file or acknowledge they had received the file. I was instructed to tell the applicant he was not hired because another applicant was more qualified. According to Ms. Herring, these instructions came from Mr. Andy King.

38. Hipp also testified that Horton told him King forced Horton out. According to Hipp, Horton could no longer withstand the pressure King was putting on him.

39. Plaintiffs claim these statements constituted direct evidence of age discrimination, and, in denying Liberty National's first motion

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made these statements in reference to Hipp himself, but rather alleged they were evidence of widespread age animus within the company.

Hipp's claims mainly centered around two confrontations with King, as well as several smaller incidents. Hipp's first confrontation with King occurred at an April 1993 meeting he had with King and Horton.[40] Hipp complained that the meeting was supposed to be in his district office at 8 a.m., but around 8:30 or 8:45, King and Horton called and asked Hipp to meet at a coffee shop instead.[41]

Hipp claimed that at the meeting, in a public area in the restaurant, King "verbally attacked [him] in a manner that [he had] never been spoken to before." Hipp said the attack related to every aspect of his job, but King's main concern was the negative growth rate in Hipp's district at the time. Hipp denied that his growth rate was negative and believed his own numbers were more accurate than King's, but King got very angry when Hipp questioned his numbers. King and

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for JMOL, the district court agreed. We need not determine whether these statements constituted direct evidence. Since we conclude Plaintiffs have not established they were subjected to any adverse employment actions, it does not matter whether they were relying on direct or circumstantial evidence.

40. Hipp was 43 years old at the time of this meeting.

41. Hipp testified that he had received several personnel transaction memos (PTMs) from Horton in the weeks before the meeting.

Horton told Hipp he should quit if he was unable to do the job. Hipp said he would not quit; they would have to fire him. King and Horton then told Hipp to summon his sales managers to the coffee shop, and, when he complied, King and Horton berated the sales managers in much the same manner as they had Hipp.

Hipp's second confrontation with King concerned a conflict between the two men regarding an agent in Hipp's district who accused another agent and a sales manager of sexual harassment. Hipp disagreed with King about the punishment the accused harassers should receive and thought they were being treated unfairly because the company had not confirmed the harassment.[42] At a weekend retreat, King approached Hipp and told him he wanted to discuss the harassment problem and the "lousy job" Hipp had done in controlling the situation. Hipp wanted to have the conversation at another time because both men had been drinking, but King refused. King berated Hipp and told him he was a "terrible district manager." Hipp walked away, but King followed him. King apologized the next day, but Hipp was upset that the apology was private because the humiliation had been public. Hipp refused to shake King's hand.[43]

ADEA does not guarantee employees a stress-free working environment. While we might disagree with the

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42. The sales manager admitted going to the complaining agent's house, uninvited, and taking a nap in her bed.

43. In addition to these two encounters, Hipp testified that he had several telephone confrontations with Mr. King.

behavior of Horton and King, we cannot find that it rises to the level of constructive discharge in violation of ADEA. *See, e.g., Clowes v. Allegheny Valley Hosp.*, 991 F.2d 1159, 1162 (3d Cir. 1993) ("[A] constructive discharge claim based solely on evidence of close supervision of job performance must be critically examined so that the ADEA is not improperly used as a means of thwarting an employer's nondiscriminatory efforts to insist on high standards."); *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985) ("Every job has its frustrations, challenges, and disappointments .... An employee is protected from a calculated effort to pressure him into resignation through the imposition of unreasonably harsh conditions, in excess of those faced by his co-workers. He is not, however, guaranteed a working environment free of stress.").

Hipp also complained it was difficult for him to abide by Liberty National's alleged policy of not hiring agents over age 55, because his district, Fort Myers, Florida, had a large elderly population. He talked to Horton about this problem, but Horton said King would not allow Hipp to violate the over-55 policy. Hipp also testified that Horton told him to fire an agent named Wes Adams because Adams was too old.[44] Hipp wanted to allow Adams to work two more years so Adams would receive retirement benefits, and he ultimately succeeded in doing so. Hipp also stated that after he was promoted to District Manager, a sales manager in his district, a Mr. Johnson, was giving him trouble. He later found out Mr. Johnson was supposed to be promoted to the District Manager position Hipp received. Horton told Hipp that

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44. Hipp testified Adams was in his 60s at the time.

Johnson was too old to do the job. Horton also made negative comments about the age of Hipp's secretary. Hipp stated that these comments "bothered" him.

The testimony that Liberty National would not allow Hipp to hire agents over age 55 fails to show Hipp was constructively discharged because of his own age, 43. As noted above, this policy did not apply to Hipp. *See supra* note 30. Furthermore, if the policy existed, the evidence is that it applied equally to all districts, and was not implemented to burden Hipp.[45] According to Hipp's testimony, the policy was intended to reduce the company's costs in paying benefits for agents over 55, not to force District Managers in their 40s to leave the company. Similarly, even if Hipp was told to fire Adams because Adams was too old, this testimony does nothing to establish that Hipp was constructively discharged because of his own age. Likewise, the comments regarding Johnson and Hipp's secretary, although perhaps offensive, fail to establish that Hipp was subjected to a hostile environment or constructively discharged because of his own age.

Hipp testified about several other alleged indignities he suffered in the latter years of his employment with Liberty National. He complained that agents, Sales Managers, and District Managers began to receive less training after Hudson joined the company, and he began to receive more personnel

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45. In other words, the policy made it harder for all District Managers, those under 40 as well as those over 40, to hire agents over 55. As noted *supra* note 30, we cannot find that a policy of refusing to hire agents over age 55 created a hostile environment for all current employees over age 40.

transaction memos (PTMs) criticizing his performance. He complained that the company began to emphasize bank-budget or bank-draft sales over field-collection sales, but failed to provide any training in this new sales method.[46] Hipp asked King to provide training for the agents, but King told him to train the agents himself. Hipp also complained that around 1990 or 1991 the company went to a "growth bonus" instead of a bonus based on the employee's overall performance. According to Hipp, the new bonus system was unfair.

Hipp further complained that King cut expenses. He claimed King did not allow him to have a full-time secretary during part of his employment. He sometimes had to close the office during the day because he did not have a secretary, and his business suffered as a result. While it may be true that he was not allowed to have a full-time secretary, and while this restriction may have been bad business, Hipp did not testify that younger District Managers were

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46. Hipp also received criticism because his agents were writing too much field collection business. The company told him not to allow agents to write more than 20 percent field collection business each week. Hipp claimed if the agents could not write more than 20 percent field collection business, the office would not have experienced any growth. Although perhaps true, this evidence is irrelevant. Hipp has not alleged that younger District Managers could allow their agents to write higher percentages of field collection business. From the evidence, we can only conclude the change from field collection to bank draft business affected all District Managers. In fact, Hipp himself suggested it was a company-wide policy ("It was during the time we were trying to go from field collection to bank draft. It was — the company was in that mode to get it done.") It is therefore not evidence of age discrimination.

permitted to have secretaries or in any way connect the company's actions to his age.[47]

Hipp also complained that he was told to cut his lawn service expenses from $73 per month to $42 per month, the company-wide limit. He claimed it was impossible to trim that much money off his lawn bill, and he complained to Horton and King. King refused to make an exception for Hipp, and King said he did not care about Hipp's problems.[48] Hipp also testified that his office was in disrepair and needed to be remodeled. He had been trying to get it remodeled since 1986, and when he finally got it remodeled, he was not allowed to make all of the desired repairs. It may have been bad business for the company to cut Hipp's lawn expenses and delay remodeling his office. Perhaps customers were drawn to the office because of its appealing landscaping, or perhaps they were repelled by its state of disrepair. It was not, however, age discrimination. One's working environment does not become objectively intolerable simply because it becomes less attractive.[49]

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47. Refusing to allow an employee in Hipp's position to hire subordinates to help him run the office might in some circumstances constitute constructive discharge. For such conduct to qualify as age-based constructive discharge, however, the employee must at a minimum show that employees outside the protected group were treated differently. *See, e.g.*, *Mendoza*, 195 F.3d at 1253 (Edmondson, J., concurring). Hipp has made no such showing here.

48. Hipp canceled the lawn service because the company he used could not do it for $42. Hipp's lawn expenses were restored to their previous level after approximately two months, during which Hipp complained regularly to Horton.

49. Additionally, Hipp makes no allegation that younger District Managers were not asked to prune their lawn budgets. Such a showing

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Hipp also complained that all districts were told to keep their expenses at the same level, even though the needs of the districts varied widely. He was charged for going over the budget on janitorial and landscaping services, even though he did not exceed the total budget for all items. Again, Hipp did not allege that the expense targets were intended to force older District Managers into retirement, or even that the expense targets had a disproportionately harsh impact on districts run by older District Managers.[50] Rather, it appears from the testimony that the expense targets applied to all District Managers. In fact, Hipp admitted on cross-examination that all District Managers were sent a letter stating that they would be financially responsible for any over-budget amounts for janitorial or landscaping services. The fact that Hipp did not like complying with company-wide budget limitations does not mean he was constructively discharged in violation of ADEA.

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would be essential to establishing that any constructive discharge was based on Hipp's age. *See, e.g., Mendoza,* 195 F.3d at 1253 (Edmondson, J., concurring). Indeed, the testimony suggests the cap on landscaping budgets applied equally to all districts.

50. Hipp also testified that when the districts were ranked, the rankings did not take into account the number of agents in each district, implying that this failure caused his ranking to suffer. Hipp did not allege the rankings were deliberately skewed to make it appear as though the districts run by older District Managers were not doing well. Approximately three months before Hipp resigned, Horton sent him a letter stating he was very disappointed in Hipp's ranking because he knew Hipp's ability as a District Manager.

Hipp testified he felt forced to resign, but he did not know at the time that age was a factor. He said the day he left, he did not know why he was not being treated well; his "biggest problem" was that he "could not figure out why" he was being treated poorly. He discussed his unhappiness with Horton, and Horton told him things were worse in the home office. Hipp testified that it took him "almost a year" before he could "figure it out — what was going on in the company." He started seeing other older District Managers leaving the company. The more he thought about it, he realized Liberty National was forcing out the older District Managers.[51]

At trial, under examination by his own counsel, Hipp made the following statements:

> Q: At the time you resigned, were you having physical and emotional reactions to the situation that you were under?
>
> A: Yes.
>
> Q: Okay. Did you consider those — the situation you were under to be something you could tolerate?
>
> A: Yes.
>
> Q: And do you consider yourself a reasonable person?
>
> A: Yes.

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51. Hipp's immediate replacement was Forrest Ayers, who is 16 years older than Hipp.

Appendix A

As noted above, to prove constructive discharge, a plaintiff must prove his working conditions are so intolerable that a reasonable person would feel he had no choice but to resign. Hipp stayed for several months after the allegedly discriminatory confrontations, suggesting the confrontations were not so intolerable as to leave him with no choice but to resign.[52] As quoted above, Hipp himself admitted at trial that his working conditions were tolerable. He also testified he did not believe at the time he resigned that he was being discriminated against on the basis of his age. Hipp's termination form indicates he resigned because he did not like the direction in which the company was moving. Most of Hipp's complaints related to King's general management style, and he failed to show that younger District Managers were treated differently.[53] *Cf. Mendoza*, 195 F.3d at 1253

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52. Hipp admitted he was considering leaving the company before his altercations with King. In fact, at that time, he had made a list of the "pros" and "cons" of staying with the company. He also admitted on cross-examination that Regional Vice President Dale Rainey called him after he left and asked him to return to the company, but he refused. On Hipp's termination form, the regional vice president wrote that Hipp had above average sales ability, and that he would reemploy Hipp "with a complete turnaround in . . . attitude." The regional vice president gave the following description of Hipp:

> This man has been in the past an asset to the company. Over the last year, he has developed a very poor attitude. With a change in attitude, I think he can be an asset in the future.

53. Hipp did testify that one younger District Manager, Mark Allen, told him he "really wasn't having a problem with anything." Hipp did not, however, produce any evidence showing that Allen

(Cont'd)

(Edmondson, J., concurring) (sexual harassment plaintiff must prove men were treated considerably differently, and better, in order to prevail).

In light of the foregoing, the finding that Hipp was constructively discharged in violation of ADEA was is not supported by the evidence. The district court should have granted JMOL to Liberty National on Plaintiff Hipp's claims, as he failed to prove he suffered an adverse employment action. The judgment in his favor must therefore be reversed.

Plaintiff Stell

On February 6, 1995, at age 43, Stell tendered his letter of resignation from his position as District Manager in Troy, Alabama.[54] Stell's resignation was to become effective February 17, 1995. On February 14, 1995, King told him he was no longer needed at the company. Stell said that, in his opinion, he was fired.[55] Stell filed a charge of discrimination with the EEOC on February 22, 1995.[56]

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was actually treated differently; Allen could have been subjected to the same treatment, but simply not found it offensive. Alternatively, it might be true that Allen received less criticism than Hipp received, but the record is silent on whether Allen and Hipp were performing at the same level.

54. Stell had previously been District Manager in Brunswick, Georgia. In May or June of 1992, at age 41, Stell requested and received a transfer to Troy, Alabama.

55. If Stell were claiming unlawful termination, he would also need to claim constructive discharge to collect any significant (Cont'd)

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damages, as the alleged unlawful termination occurred only three days before his resignation was to become effective. (If he was paid through February 17, he would apparently have no monetary damages.) At any rate, we think it doubtful Stell could prevail on an unlawful termination claim merely because he was told he could leave three days before his resignation was to become effective. King signed Stell's notice of termination of personnel, stating that Stell was resigning to accept another job. On this form, King rated Stell's sales ability as very good and indicated he would re-employ Stell.

56. Stell made the following allegations in his EEOC charge:

> I was hired by the company on May 8, 1978 as an Insurance Agent. On February 14, 1995 the above-named employer discharged me. During my employment I had been subjected to constant threats and harassment by my immediate supervisor. On February 6, 1995 I tendered my resignation to the company's president because of the treatment I was being subjected to. I was employed as a District Manager at the time of my termination.
>
> Mr. Andrew King, Senior Vice-President, stated that if I could not work under his supervision, I was fired.
>
> I believe that I have been discriminated against in violation of the Age Discrimination in Employment Act (ADEA) because of my age, 43.
>
> The vice-president has stated that he was seeking younger persons for management with the company. Older long-term employees are being terminated while less productive younger employees are being retained. The person I replaced was given the ultimatum to retire or he would be replaced.

Stell testified that he was quite fond of Liberty National until 1993, when the harassment began. According to Stell, Regional Vice Presidents Steve Sexton, King, and Vurl Duce either threatened or harassed him or knew about the threats and harassment. He called Duce and "talked to him about it."

One of Stell's chief complaints was that he received a large number of PTMs from King. He regarded these PTMs as "threats." At trial, however, Stell testified he would write PTMs for the agents in his district when they were not performing well. Stell admitted these PTMs were "no different" from the ones King sent him. Stell testified he did not regard as a threat language in a PTM he sent one of his agents stating the agent "must have positive growth and maintain a positive, enthusiastic attitude if he is to continue his employment with Liberty National." Stell sent a PTM to another agent stating, "If no improvement is made within the next four weeks, termination is imminent." Stell testified he did regard this language as a threat to the agent's job. He claimed he did not think such language was "justified," but he "wrote something down according to the company's rules and regulations." Stell further admitted at least some of King's concerns about Stell's job performance were valid.[57]

Stell testified that King said at a meeting "that change would be easier to make if we had younger district managers,"

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57. Stell claimed he did not like the way King treated him, and he did not know why he was being treated that way. He admitted all of the perceived threats were job related. In a job performance review in which he rated his own performance, Stell rated himself less than satisfactory in district production and premium growth.

and King told him that sometimes it was easier to replace employees than to retrain them. King once said Stell "need[ed] to get off [his] fat ass and go to work," and Stell claimed he was "humiliated" by this remark.[58] King called Stell while Stell was in the hospital for suspected heart problems, and, upon finding Stell's condition was not serious, King inquired about the production for that week in Stell's district.[59] Stell also complained that King interrupted Stell while he was meeting with customers. According to Stell, this treatment by King caused him "some severe health problems."

Stell also complained about a trip to a company leadership conference in Cancun. The conference was developed by King. Stell and several other employees "won" this trip. Many of the other employees who "won" the trip were older or even "very much older" than he was. Stell did not go on the trip because it conflicted with his planned family vacation. Stell testified that King was "not real happy with me, and he said that I would never do this to him again." Stell complained about the "harassment and treatment [he] received after" declining to go on that trip. Even if Stell was treated poorly after declining to go on the trip, there is no indication that such treatment was due to his age.

Stell also complained that he had to pay out of his own pocket for a Sales Manager to attend the Cancun trip.

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58. Stell testified that King's remark about his weight was a one-time occurrence, and it drove Stell to make the decision to leave Liberty National.

59. Stell admitted on cross-examination that he also received flowers from King and his wife on that occasion.

He testified that "[u]nder this trip that Mr. King designed and developed, sales managers had to pay out of their pocket for an agent to attend this trip. District managers had to pay for the leading sales manager in the — their district to attend this trip." Stell did "not feel that [he] should have to personally pay out of [his] pocket to send an agent on a trip that was a company — or a company-sponsored program."[60] If this was the company policy, and even if it was a bad policy, Stell utterly failed to connect it in any way to age discrimination. In fact, he admitted younger District Managers also had to pay for their Sales Managers to go on the trip.

Stell also testified that the company refused to authorize repairs to his district office. He claimed his office was remodeled about a month after he was replaced by a new District Manager, Cecil Harris, who was in his "late 30s, early 40s." Stell also complained about a "Torch Club" convention he wanted to attend. He was told he would not be invited, but that opt-in Plaintiff Harold Carter would be invited instead, because Carter's district had been experiencing positive growth. When Carter went on sick leave, Stell asked to take his place at the convention, but Stell was not invited. He claimed younger, less productive District Managers were invited. Stell admitted, however, that at least one of the managers in attendance was in his late 50s or early 60s.

Stell claimed King was "more of a buddy" to the younger District Managers but "more business-like with the older

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60. As noted *infra*, King later offered to reimburse Stell for this expense.

district managers." Even if true, this difference in treatment does not mean Stell was constructively discharged because of his age. It is hardly intolerable for an employee's superior to treat him in a "business-like" manner, even if the employee thinks the supervisor appears friendlier to others.

Stell also testified that King instructed him to notify an older agent that the agent would be fired if he did not show positive growth within four weeks. Stell testified that, because of this particular agent's work situation, it would be impossible for the agent to show positive growth within that time frame. Stell also testified that once, when he did need to fire an agent, Liberty National's legal department asked him the gender, race, and age of the agent. When Stell replied that the agent was a white male under 40, he was told to proceed with the firing. Plaintiffs contend this evidence supports an inference that Liberty National was trying to "build a file" on protected employees before firing them. It may be true that this evidence indicates Liberty National was concerned about its liability under federal employment discrimination statutes. This evidence, however, does not suggest in any way that Liberty National was attempting to drive older employees out of the company by "building files" consisting of fabricated incidents. If anything, it indicates Liberty National was conscientious about ensuring that protected employees were not fired without good cause.

Stell claims when he left the company, the specific incident on his mind was his telephone conversation with King in which King commented on Stell's weight. Stell testified he met with Tony McWhorter, Liberty National's president, and William Barcliff, Liberty National's chief legal

counsel, to discuss King's harassment of Stell and to request a transfer out of King's division.[61] He wanted to be transferred to Duce's division because he was "familiar" with Duce's management style. McWhorter told Stell he could not transfer him. Stell tendered his resignation. McWhorter and Barcliff asked Stell to stay and asked what it would take to make him stay. Stell said he would stay if they would transfer him out of King's division, but they still told him they could not make the transfer. Barcliff then asked if Stell planned to sue the company. Stell was surprised by this question, as he did not intend to sue the company at that time.

After Stell tendered his resignation, King met with Stell and apologized for everything unpleasant he had said or done, telling Stell that was just his management style. Stell complained that he had been forced to spend $5,000 out of his own pocket to, among other things, send the Sales Manager to Cancun, and King offered to write him a personal check to reimburse him for those expenses if Stell would stay with the company. Stell once again said he would stay if he could be transferred out of King's division, and King told him a transfer would be impossible.

Sexton called Stell at home on one occasion and visited him two weeks later, asking him to come back to the company. Stell, however, said he would not come back unless he could be transferred out of King's division. The company

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61. Stell admits not all of his contact with King was negative. In fact, Stell testified that on May 31, 1993, King sent a letter to all District Managers praising Stell as a good example for them. In February 1994, the company sent out another letter praising Stell's performance and sent Stell a congratulatory memo.

refused.[62] Later, Regional Vice President Newell Cheeseborough contacted Stell, and Stell gave him the same demand.

Stell testified he did not believe at the time he resigned that he had been discriminated against on the basis of his age. Accordingly, even though Stell claimed to have complained to the company about King's "harassing" and "threatening" behavior, he never told anyone the harassment and threats were age-related, because Stell did not think at the time that they were age-related. The record reveals that Stell left his position because he did not like King's management style. After Stell's resignation, he spoke with other people and came to the conclusion that he "fit in the pattern of the older district managers being replaced by younger district managers." He then determined King's treatment of him was part of "a program designed by the management, upper management of this company, to remove the older district managers."[63]

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62. As mentioned above, Stell's willingness to return to the company if he could be transferred out of King's division indicates he did not believe discrimination was Liberty National's "standard operating procedure."

63. Stell testified that Horton told him during his first week as District Manager in Troy, Alabama, that his predecessor "was forced to either retire or be replaced because he had gotten to old to be effective in his job." Stell admitted, however, that the Troy district had been performing very poorly before he arrived, suggesting his predecessor did not do a good job. Even if Stell believed his predecessor was forced into retirement, he did not believe at any time before he resigned that Liberty National was trying to force him to leave his job because of his age.

Appendix A

Stell's letter of resignation is quite revealing and is reproduced here in its entirety:

Mr. McWhorter:

May 8, 1978 was one of the happiest days of my life. That was the day that I joined the sales force of Liberty National. I will never forget the words told to me by District Manager George Bates, "Take care of LNL and LNL will take care of you". These are words that I have tried to live with for the last 17 years, but I don't feel that I can anymore. Working for LNL is no longer fun for me but something I have grown to dread.

I have always been a person that motivated people to want to do their job, to try to help them reach their goals and dreams, not a person that had to threaten a person with their job if the results were not what *I wanted.* I can not bring myself to operate this way or to treat people this way.

For several months, I have been considering opening my own agency. I have always thought that I wanted to sell other insurance products that LNL didn't offer, such as medical insurance, disability, dental, etc.. For this reason I have been making contacts with several companies and general agents, but I have not made any attempts to sign contracts or get licensed with anyone. My loyalty is still with LNL until my decision was made.

Appendix A

I have been made an offer to become a partner in Brokerage Concepts, Inc. with Olley Kelley, which I have decided to accept. **I want you to know that I don't have any hard feelings toward you or LNL** and that I am not leaving with the idea of replacing LNL's business. However, due to the fact that I will be working the same area, I will be calling on some of the same customers, but to add to their coverage not replace what they have.

I have enjoyed my relationship with LNL and will always be greatfull [sic] to ya'll for giving me the opportunity that I have had. I hope that if this doesn't work out for me that I might be allowed to return to LNL in the future.

As I know how much change affects a District office, I feel that the quicker I am out of the picture the better it will be for my people to concentrate on the job they have to do. Therefore, please accept this letter of resignation effective Friday, February 17, 1995.

Again I have enjoyed my time at Liberty National and wish you the best.

(emphasis added).

This letter certainly does not seem like the language of someone who feels his working conditions are so intolerable he has no choice but to resign. *Cf. Graham v. State Farm Mut. Ins. Co.*, 193 F.3d 1274, 1284 (11th Cir. 1999)

("[P]laintiff's letter of resignation, in which she expressly thanks State Farm, does not by its terms lend support to a theory that plaintiff was forced to resign due to 'intolerable' working conditions."). Parts of the letter do suggest Stell was unhappy with the direction in which the company was moving. The letter reveals that perhaps he preferred a gentler style of management (i.e., motivating rather than "threatening"), but nowhere in the letter did he suggest that at the time he resigned, he felt he was treated unfairly because of his age. To the contrary, Stell represented that he would consider returning to Liberty National in the future.

Stell testified it was company policy to send PTMs to poorly performing employees. The PTMs routinely indicated that the employee in question would lose his or her job if performance did not improve. Stell further admitted that at least some of the PTMs sent to him expressed valid concerns about his performance. He therefore failed to prove that he was treated any differently than anyone else, or that Liberty National's treatment of him was in any way related to his age. Finally, and importantly, at the time he submitted his letter of resignation, Stell did not believe age discrimination was the reason for his treatment.

It is not our place to decide whether Liberty National's practice of sending "threatening" memos to its poorly performing employees was wise business policy, or whether Stell's preferred strategy of "motivating" the employees would have worked better. We must decide only whether the conduct as it related to Stell violated the ADEA, and we conclude it did not. The district court should have granted Liberty National's motion for JMOL on Stell's claims because

he failed to prove he suffered an adverse employment action. Accordingly, the verdict in his favor must be reversed.

Plaintiff Stein

Plaintiff Stein resigned from his position as District Manager in Clearwater, Florida, on July 29, 1994, at age 41. Stein filed charges of discrimination with the the FCHR and the EEOC in December 1994.[64] When Stein

64. Stein made the following allegations in his charge:

> I was employed by Liberty National Insurance Company from November 5, 1975 until I was forced to resign on July 29, 1994. As the result of management's desire to have younger management, I was subjected to continuous harassment and forced to resign when I was 41 years of age. Andy King made my job as a district manager at Liberty National impossible once he became the vice-president in charge of my side of the company. Under Andy King, I endured numerous changes in policies and procedures, as well as constant harassment and criticism, in his attempt to force my resignation.
>
> One of my duties as a district manager included the screening of potential applicants for sales positions. All of the district managers and myself were told not to send the file on any potential applicant to the home office for approval if that applicant was over the age of 60 or had health "problems". Liberty National's actions constituted discrimination against applicants over 60 and applicants with health "problems" and created a hostile working environment.
>
> Andy King and Don Horton verbally harassed me and continually made me feel like my job was in jeopardy in an effort to force me to resign.

(Cont'd)

resigned, he was replaced by Stan Watson, who was 14 years older than Stein.[65]

Stein testified that at a meeting of District Managers, King introduced the newer District Managers to "[a]ll you gray hairs." He heard King use the phrase "RC factor" to refer to an employee's "resistance to change." On several occasions, King said the company needed younger employees because older workers were resistant to change.[66]

(Cont'd)

> I believe Liberty National, C.B. Hudson and Andy King have violated my rights, as well as the rights of both older workers and applicants, under the Age Discrimination in Employment Act and the Florida Civil Rights Act of 1992. Liberty National, C.B. Hudson and Andy King have implemented a uniform practice and policy of age discrimination by forcing older employees to retire, take demotions, terminating them, and/or subjecting them to continued harassment, abuse, and discriminatory policies and practices.
>
> I file these charges on behalf of myself and all others similarly situated.

65. The district court accepted Plaintiffs' argument that Watson may have been hired to help Liberty National develop a defense to a potential age discrimination suit by Stein. *Hipp*, 973 F. Supp. at 1041-42. Stein testified that Watson did not immediately get the position because King thought Watson was too old.

66. Stein's attorney asked him on direct examination if he was "ever directed to fire somebody because of their age." Stein said he was. The questioning that followed concerned two older agents King

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Stein also complained about the company's alleged policy regarding hiring agents over age 55.[67] He said the company threatened to fire people who sent these files to the personnel department. He believed the policy was wrong, however, so he did not comply with it. He claimed Liberty National's Regional Vice Presidents refused to discuss the issue with him.

This policy, if it existed,[68] was certainly reprehensible. As discussed above, however, Stein was not subjected to this policy. The fact that Liberty National wrongfully discouraged Stein from hiring agents over age 55 does not establish that Liberty National forced Stein to resign from his District Manager position based on Stein's age, which was 41.[69]

(Cont'd)
instructed Stein to fire "because of their growth." Stein alleged King's growth numbers on the agents were incorrect, but nothing in his testimony established that King knew the numbers were incorrect or that the agents were being fired because of their ages.

67. At trial, Stein testified that the policy applied to applicants over age 55. In his complaint to the FCHR, he stated the policy applied to applicants over age 60.

68. On cross-examination, Stein was shown Liberty National's contracts with several agents who were over age 55 when Stein hired them. All of these agents were hired when this policy was allegedly in effect. Some of the agents also had known medical conditions when they were hired.

69. Indeed, to hold otherwise would mean that any of Liberty National's employees who were over 40 at the time this alleged policy was in place could have simply resigned from their positions and sued Liberty National for age discrimination. ADEA was not meant to give one employee a cause of action for age discrimination against another.

Stein also complained that King "got very belligerent" over some of Stein's numbers, but the numbers on which King based his criticism were incorrect. Stein testified that King would not listen when Stein told him the numbers were wrong, and "it got to almost a violent situation."[70]

Stein also complained that a District Manager who looked younger than Stein was brought in to open up a new office in St. Petersburg, Florida.[71] Stein said King described this man as a "young and up-coming man, with lots of energy and [who is] going to show you how to do your job." This District Manager was given company money to fund his recruiting efforts, while Stein had to pay for his own recruiting. Since the other District Manager was starting a new office, and Stein was maintaining an existing office, we do not think this disparity is important, especially since Stein does not allege that other younger District Managers were likewise given recruiting budgets.[72]

Stein testified that King's "constant harassment" of him made his job difficult. He claimed his responsibilities were

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70. Stein claimed that, on the advice of Liberty National's legal counsel, he started an "Andy King file," but he left it in his desk when he departed. After the locks were changed, he could not retrieve the file.

71. On cross-examination, Stein clarified that he did not know if the man actually was younger, but he looked younger. According to defense counsel, the man was actually one year older than Stein.

72. Stein testified that, at the time, he had no problem with the new District Manager.

"inconsistent," so he was constantly confused about what his job actually was.[73] One such "inconsistency" was that Liberty National required agents to begin selling on a bank-budget basis instead of a field-collection basis. Stein also testified that the company constantly changed the salary at which District Managers could hire new agents, and the company's goals on the number of new agents were also constantly changing. Stein also complained that when his three full-time secretaries left, he was not allowed to hire any new full-time secretaries, but some other District Managers were. Stein testified that his health was suffering as a result of his stressful work environment, and he "was not comfortable with ... the way [he] was forced to treat [his] agents."

Stein signed a contract and took out a license with another life insurance company (C Corp) prior to leaving Liberty National.[74] He admitted this action was in violation

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73. Stein admitted on cross-examination that King also sometimes sent letters to all District Managers praising Stein for something he had done particularly well.

74. He signed this contract three months before he left, on April 6, 1994. He testified that he was told he had to sign the contract right away or the opportunity would no longer be there. He testified he signed it because he knew he was going to be leaving Liberty National in July. He had another job lined up, and the other company wanted him to begin working, but he stayed at Liberty National, working under conditions he alleges were intolerable and getting worse. It seems unlikely that an employee who is constructively discharged under intolerable working conditions would plan his departure for three months.

of his contract with Liberty National,[75] but claimed he did it because he could see he "had no future at Liberty National."[76] The offense was one that, according to Liberty National's employment manual, would "normally result in termination of employment."[77]

Stein does not allege that the younger District Managers were the ones who were allowed to hire full-time secretaries, and he does not allege that younger District Managers were treated any differently with respect to field-collection business and the hiring of new agents.[78] Stein testified that he did not know whether the rules on hiring new agents changed in other districts in the same way they changed in

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75. His actions in working for Liberty National likewise violated his contract with C Corp. C Corp eventually sued Stein to recover the money it had paid him as either salary or advance commissions. In that lawsuit, Stein asserted that C Corp could not recover the money from him because he performed work for it during the period in question. The suit was eventually dismissed.

76. Plaintiff Hipp, who also worked for C Corp after he left Liberty National, testified that Stein spent about five hours a week working for C Corp while Stein was still employed by Liberty National.

77. In fact, while he was at Liberty National, Stein himself fired other employees for the same offense.

78. Stein did testify that the field-collection rules were different in other districts, but he did not testify that these differences depended on the ages of the District Managers. Stein complained about the forms on which District Managers reported production, but he admitted they were the same in every district in King's region.

his. He also did not know whether the changes in the number of new agencies applied to other districts.

On direct examination, Stein testified that he believed age was a factor in the way he was being treated. He raised the issue in his letter of resignation, and no one attempted to persuade him to stay with the company. At deposition, however, Stein stated he could not recall anyone ever saying or doing anything that made him believe he was being discriminated against on the basis of his age. The record reveals that Stein resigned because he was unhappy with the direction in which the company was moving. There is no support for the conclusion that Stein was constructively discharged in violation of ADEA.

Based on this record, the finding that Stein was constructively discharged in violation of ADEA is not supported by the evidence. The district court should have granted JMOL to Liberty National on Stein's claims, as he failed to prove he suffered an adverse employment action. Accordingly, the verdict in Stein's favor must be reversed.

Summary

After our thorough review of the extensive record created in this case, we are left "with the definite and firm conviction that no reasonable [people] in [Plaintiffs'] position[s] would have felt compelled to resign." *Wardwell*, 786 F.2d at 1557. At most, Plaintiffs have proven that King had a harsh, confrontational, and perhaps even at times offensive style of management, and the company was changing some of its policies regarding the manner in which it conducted its business. While King's management style may or may not

have been effective, and the changes in Liberty National's business practices may or may not have been wise, it is not our place to tell employers how to run their businesses. *See Chapman v. AI Transport*, 229 F.3d 1012, 1031 (11th Cir. 2000) (en banc). Plaintiffs have not proven that age-based harassment caused their working environments to become so objectively intolerable that they had no choice but to resign.[79] Since Plaintiffs have not shown that they were subjected to adverse employment actions, the district court should have granted judgment as a matter of law to Liberty National on Plaintiffs' claims,[80] and its judgment in favor of Plaintiffs must be reversed.[81]

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79. As we have found Plaintiffs were not constructively discharged, we need not address Liberty National's claims regarding the amount of damages awarded.

80. Assuming hostile environment claims are cognizable under ADEA, the Plaintiffs also have not met the less stringent standard for a hostile environment. *See Massey Yardley*, 117 F.3d at 1249 n.7 (noting this circuit has not explicitly determined whether the hostile environment framework developed in Title VII cases applies to ADEA cases). In evaluating hostile environment claims, courts are to "determine whether an environment is sufficiently hostile or abusive by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' " *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88, 118 S. Ct. 2275, 2283 (1998) (citation omitted). The conduct Plaintiffs allege was not sufficiently severe or pervasive as to constitute a hostile environment. "We recognize that claims of employment discrimination . . . present fact-intensive issues. However, we agree with the Fifth Circuit's observation that motions for summary

(Cont'd)

(Cont'd)
judgment or judgment as a matter of law are appropriate to 'police the baseline for hostile environment claims.' " *Mendoza*, 195 F.3d at 1244 (quoting *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 264 n.8 (5th Cir. 1999)); *see also id.* at 1246-47 (listing cases in which courts have found no sex-based hostile environment).

81. Liberty National argues Plaintiffs should not have prevailed because they did not prove they had reported offensive behavior pursuant to Liberty National's anti-harassment policy. *See, e.g., Coates v. Sundor Brands*, 164 F.3d 1361, 1364-65 (11th Cir. 1999) (hostile environment plaintiff must notify employer of harassment and give employer a chance to remedy the situation); *Kilgore v. Thompson & Brock Mgmt., Inc.*, 93 F.3d 752, 754 (11th Cir. 1996) ("A constructive discharge will generally not be found if the employer is not given sufficient time to remedy the situation."). Plaintiffs argue they were not required to complain because the alleged policy originated with the very people to whom complaints should have been directed. They also allege that, even though it was not required, they did complain. The record reflects at least some of the Plaintiffs complained to the legal department about King's behavior. The jury was instructed that Liberty National would not be liable if it proved "by a preponderance of the evidence that it maintained an antiharassment policy and complaint procedure and that the plaintiffs unreasonably failed to make a complaint under that procedure." The jury apparently found there was no such unreasonable failure. Most of Plaintiffs' complaints to the company seem to have centered on the over-55 hiring policy, which is not directly relevant to Plaintiffs' claims that they personally were harassed and forced out of the company. It is unclear whether any Plaintiff actually complained to the company about age-based harassment directed toward him, **but it seems unlikely, given that most Plaintiffs did not suspect age discrimination when they left Liberty National.** It is unnecessary for us to decide this question, however, since we determine Plaintiffs did not prove they were constructively discharged because they did not prove their working environments were objectively intolerable.

III. CONCLUSION

We AFFIRM as to the district court's certification of the opt-in class. We REVERSE, however, the district court's definition of the temporal scope of that class. The rearward scope should have been limited to 180 days (in non-deferral states) or 300 days (in deferral states) before Plaintiff Stein filed the representative charge in this case. Plaintiff Lee's claim therefore fell outside the temporal scope of the class, and he should not have been allowed to join. The jury's verdict for Plaintiff Lee is REVERSED. The forward scope of the class should have been cut off the day Plaintiff Stein filed the representative charge with the EEOC. Since the claims of Plaintiffs Agee, Tuggle, and Carter arose after that date, those Plaintiffs should not have been allowed to join in this action, and the jury verdicts in their favor are REVERSED. We also REVERSE the finding of a pattern and practice of discrimination in this case, because there was insufficient evidence that discrimination was Liberty National's standard operating procedure. Finally, we REVERSE the jury's verdicts as to Plaintiffs Hipp, Stein, and Stell, because those Plaintiffs did not prove they were subjected to age-based hostile environments or constructively discharged because of their ages.

AFFIRMED in part and REVERSED in part.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION DATED AUGUST 17, 1999 AND FILED AUGUST 18, 1999

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 95-1332-CIV-T-17A

DAVID HIPP, BRAD STEIN, MIKE STELL,
and All Others Similarly Situated,

Plaintiffs,

v.

LIBERTY NATIONAL LIFE INSURANCE COMPANY,

Defendant.

ORDER

This cause comes before the Court on the following:

1. Plaintiffs' motion for attorneys' fees and supporting memorandum (Docket Nos. 391-392), filed March 29, 1999; and Defendant's response (Docket No. 401), filed April 12, 1999;

2. Defendant's motion for remittitur or for a new trial on the issue of damages and supporting memorandum (Docket No. 392-393), filed

March 31, 1999; and Plaintiffs' response (Docket No. 406), filed May 4, 1999; and

3. Defendant's motion for judgment as a matter of law or for a new trial and supporting memorandum (Docket No. 394-395), filed March 31, 1999; and Plaintiffs' response (Docket No. 407), filed May 4, 1999.

I. Motion for Costs and Attorneys' Fees (Docket No. 391)

Plaintiffs move for an award of their costs and attorneys' fees, pursuant to 29 U.S.C. Sections 216(b) and 626(b) and, with respect to the Florida Plaintiffs, Section 760.11(5), Florida Statutes. However, in the time since Plaintiff's motion for costs and attorneys' fees was filed, the Defendant has filed multiple post-trial motions, as well as a notice of appeal. Responding to the post-trial motions has obviously entailed the expenditure of a great deal of attorney time, and, most likely, the incurrence of further costs as well. Responding to the appeal will add further to this total. Moreover, the outcome of the appeal could affect whether some or all of the Plaintiffs are entitled to an award of costs and attorneys' fees. In the interests of judicial economy, the Court will therefore defer ruling on costs and attorneys' fees until all appeals have been resolved.

II. Motion for Judgment as a Matter of Law, or, Alternatively, for a New Trial on Liability (Docket No. 395)

The Defendant argues that it is entitled to judgment as a matter of law or a new trial on several grounds:

Appendix B

(1) judgment as a matter of law with respect to the claims of Plaintiffs Lee, Agee, Carter, and Tuggle on the grounds that a collective action was improper in this case, and that those Plaintiffs' claims arose outside of the appropriate temporal and subject matter scope for inclusion in this case; and, on that basis, a new trial with respect to the claims of Plaintiffs Hipp, Stein, and Stell, because the inclusion of evidence on the claims of the improperly included Plaintiffs prejudiced the Defendant with regard to the claims of the properly included Plaintiffs;

(2) judgment as a matter of law with regard to the Plaintiffs' pattern and practice claims, because the testimony presented was not sufficient to establish a pattern and practice of discrimination, and because the Plaintiffs did not provide statistical evidence in support of that claim;

(3) judgment as a matter of law on each of the Plaintiffs' claims, because, assuming that Plaintiffs did not establish that there was a pattern and practice of discrimination, each Plaintiff did not present sufficient evidence individually to support his claim;

(4) a new trial on each of the Plaintiffs' claims because the Court refused to give certain jury instructions;

(5) a new trial on each of the Plaintiffs' claims, because the jury heard evidence that was time-barred, evidence of discrimination against others, and evidence of stray remarks;

(6) judgment as a matter of law on the jury's liquidated damages, punitive damages, and pain and suffering verdicts, because those verdicts were not supported by substantial evidence;

(7) a new trial or remittitur on the award of backpay, because the reports prepared by Plaintiffs' expert witness were unreliable.

Most of these issues have already been addressed by the Court at least once, if not several times, making the Defendant's motion on those issues essentially motions to reconsider. A motion for reconsideration must demonstrate why the court should reconsider its prior decision and "set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Cover v. Wal-Mart Stores, Inc.*, 148 F.R.D. 294, 294 (M.D. Fla. 1993). As such, a motion to reconsider should raise new issues, not merely readdress issues previously litigated. Courts have recognized three (3) grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or manifest injustice. *See Major v. Benton*, 647 F.2d 110, 112 (10th Cir. 1981). This Court will not reconsider a previous ruling when the party's motion fails to raise new issues and, instead, only relitigates what has already been found lacking. *See Government Personnel Serv., Inc. v. Government*

Personnel Mut. Life Ins. Co., 759 F. Supp. 792, 793 (M.D. Fla. 1991), aff'd, 986 F.2d 506 (11th Cir. 1993).

Here, the Defendant has presented neither new argument nor new authority on these issues, and has not persuaded the Court that either clear error or manifest injustice exists. The Court will discuss each of the arguments raised by the Defendant in its motion in order to ensure the clarity of the record. However, the Court will not retread ground it has already covered.

In considering a motion for judgment as a matter of law, a district court must consider the evidence "in the light most favorable to, and with all reasonable inferences drawn in favor of, the non-moving party." *Montgomery v. Noga*, 168 F.3d 1282, 1289 (11th Cir. 1999) (quoting *Walker v. Nationsbank of Florida, N.A.*, 53 F.3d 1548, 1555 (11th Cir. 1995)); *see also, General American Life Ins. Co. v. AmSouth Bank*, 100 F.3d 893, 899 (11th Cir. 1996); *Harris v. Chapman*, 97 F.3d 499, 505 (11th Cir. 1996). "A party is entitled to judgment as a matter of law only if the evidence and inferences derived from the evidence are so strong that reasonable persons in the exercise of impartial judgment could not arrive at a contrary verdict." *General American*, 100 F.3d at 899. In deciding such a motion, "the court cannot reweigh the evidence or assess credibility." *Popham v. City of Kennesaw*, 820 F.2d 1570, 1576 (11th Cir. 1987); *see also Norton v. Snapper Power Equipment*, 806 F.2d 1545, 1548 (11th Cir. 1987). "If reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions based on the evidence presented, the motion should be denied." *Montgomery*, 168 F.3d at 1289; *see also, Harris*, 97 F.3d at 505.

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A motion for a new trial may only be granted "when the jury's verdict is against the great — not merely the greater — weight of the evidence." *Haygood v. Auto-Owners Ins. Co.*, 995 F.2d 1512, 1514-15 (11th Cir. 1993) (quoting *Fondren v. Allstate Ins. Co.*, 790 F.2d 1533, 1534 (11th Cir. 1986)); *see also, Redd v. City of Phenix City*, 934 F.2d 1211, 1214 (11th Cir. 1991). "This standard is intended to preserve litigants' right to a jury trial and to ensure that judges will not substitute their own judgment for that of the jury with respect to disputed issues of fact." *Haygood*, 995 F.2d at 1515. "[T]he district judge should not substitute his own credibility choices and inferences for the reasonable credibility choices and inferences made by the jury." *Redd*, 934 F.2d at 1215 (quoting *Rosenfield v. Wellington Leisure Products, Inc.*, 827 F.2d 1493, 1498 (11th Cir. 1982)) (alteration in original). "When there is some support for a jury's verdict, it is irrelevant what ... the district judge would have concluded." *Redd*, 934 F.2d at 1215.

A. Collective Action

The Defendant argues that a collective action was improper in this case because the Plaintiffs were not "similarly situated." The Court addressed this issue prior to trial in response to the Defendant's motion to sever. (*See* Order of November 4, 1997, at 5-6.) In the Order of November 4, 1997, the Court discussed Supreme Court and Eleventh Circuit caselaw holding that ADEA plaintiffs have a right to proceed collectively. (*See id.*) (discussing *Hoffmann-LaRoche, Inc. v. Sperling*, 493 U.S. 165 (1989); *Grayson v. K-Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996); *Flavel v. Svedala Indus. Inc.*, 875 F. Supp. 550 (E.D. Wis.

1994); and *Glass v. IDS Financial Services Inc.*, 778 F. Supp. 1029 (D. Minn. 1991)). The Court reiterated its holding that "where there is an ongoing continuous series of discriminatory acts, they may be challenged in their entirety as long as one of the discriminatory acts falls within the limitations period." (Order of November 4, 1997, at 6-7.)

In the Order on the Defendant's motion to sever, the Court also incorporated by reference its Order on the Defendant's motion for summary judgment. (*See* Order of November 4, 1997, at 7.) In its Order on the Defendant's motion for summary judgment, the Court stated that age discrimination claims are sufficiently similar to be brought in the same action so long as there are "substantial allegations that the putative class members were together the victims of a single decision, policy, or plan infected by discrimination." (Order of July 28, 1997, at 8) (quoting *Glass*, 778 F. Supp. at 1080). Using that standard, the Court then stated that the "named filing Plaintiffs' claims are broad enough to encompass the piggybacking Plaintiffs' claims." (Order of July 28, 1997, at 8.) The issue of whether a collective action was proper in this case is one the Court has already addressed. The Defendant has presented the Court with no new argument or authority on this issue, and the Court sees no reason to revisit it.

B. The Temporal and Subject Matter Scope of the Case

The Defendant argues that the Court improperly applied the rule set forth in *Grayson* for determining the temporal and subject matter scope of the evidence to be presented in this action. The Defendant argues that Plaintiffs Agee, Carter,

Tuggle, and Lee should have been precluded from the trial, and moves for judgment as a matter of law with respect to their claims. The Defendant argues further that the jury must have been influenced by what the Defendant considers to have been the improper inclusion of evidence regarding Plaintiffs Agee, Carter, Tuggle, and Lee, and moves on that ground for a new trial on the claims of Plaintiffs Hipp, Stein, and Stell.

The *Grayson* rule allows potential collective action plaintiffs to "piggyback" on a timely Equal Employment Opportunity Commission [EEOC] charge filed by a named plaintiff, provided that both claims "arise out of similar discriminatory treatment in the same time frame." 79 F.3d at 1102. Although the *Grayson* court did not address the issue of the temporal limits for a collective action, the Defendant argues that the *Grayson* rule requires that only claims arising within the 180 or 300 days (depending on whether the Plaintiff resides in "deferral" or a "nondeferral" state) prior to the filing of the representative charge may be included in a collective action.

In its previous response to the exact same argument by the Defendant, the Court addressed the issue of the proper temporal and subject matter scope of this case at length. (*See* Order of June 29, 1998, at 12-17.) The Court noted that in this case the "Plaintiffs allege a pattern or practice of age discrimination which spans a considerable time period." (Order of June 29, 1998, at 13.) With respect to the argument that Plaintiffs could not recover for discriminatory acts that occurred prior to the opening of the 180/300 day time period, the Court stated:

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> The Court is satisfied that Plaintiffs have shown a substantial nexus between the previous alleged discriminatory acts and those which fall within the limitations period. The Plaintiffs allege an orchestrated effort was implemented by Defendant in order to remove District Managers over the age of forty (40). Various witnesses have testified about statements regarding replacement by younger employees and the philosophy that older employees are too resistant to change and too expensive to maintain. There has been testimony regarding the practice of "building a file" on a employee who is targeted to be removed. Moreover, Plaintiffs have provided testimony that, as they became targeted as an employee who should be removed from the company, a file was built on them and a campaign of harassment was instituted until that particular employee was demoted, resigned, constructively discharged, etc. There is evidence that an informal practice or system was in place to accomplish the alleged goals of Defendant. The techniques allegedly utilized by Defendant to accomplish its goals are remarkably the same regardless of the time period referenced. Moreover, this is a pattern or practice case.

(*Id.* at 14-15.)

In the Order of June 29, 1998, the Court also considered the argument, now raised again by the Defendant, that Plaintiffs could not recover for discriminatory acts which

took place subsequent to the date on which the representative charge was filed. The Court stated that the Plaintiffs' claims that arose after December 9, 1994, out of the same practice and policy described in Plaintiff Brad Stein's EEOC charge "certainly grow out of the representative charge of discrimination." (Order of June 29, 1998, at 16.) It stated further that "related class claims could be expected to grow out of an EEOC charge alleging class discrimination. If that alleged policy had ceased, there would not have been any 1995-1997 claims. Moreover, since the policy or practice did not cease, it is foreseeable that the additional claims would grow out of the alleged discriminatory policy complained of on December 9, 1994, by Mr. Stein." (*Id.* at 17.)

Finally, in the same Order, the Court addressed the issue, also now raised again, of the subject matter scope of the collective action. The Court held that "the additional charges by the Plaintiffs joining the suit are reasonably related to the charge filed by Plaintiff Stein. All of the Plaintiffs allege age discrimination and contend that the practice was carried out company-wide. Although a few of the decision makers changed over the course of time, for the most part, the same individuals carried out the alleged discriminatory practice." (*Id.* at 17.)

In sum, the Court has already addressed the issue of the proper temporal and subject matter scope of this case, and rejected all of the arguments the Defendant now raises. The Defendant is not entitled to judgment as a matter of law or a new trial on this ground, because the claims of all Plaintiffs fell within the temporal and subject matter of this collective action, as defined by the representative charge filed by Plaintiff Brad Stein.

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C. Pattern and Practice

The Defendant argues that Plaintiffs did not present sufficient evidence to demonstrate that the Defendant engaged in a pattern and practice of age discrimination. In previously responding to the same argument, the Court discussed at length the evidence the Plaintiffs presented in support of their pattern or practice claim. (Order of July 29, 1998, at 4-10). The Court held that the Plaintiffs had "presented sufficient evidence to establish a *prima facie* case of a pattern or practice of age discrimination," and that this issue was a "question for the jury to decide." (*Id.* at 10).

Moreover, as Plaintiffs rightly point out, the Court excluded further evidence on the policy and practice issue, on the ground that further evidence on that point would be cumulative. The Defendant cannot have it both ways by moving for the exclusion of evidence on a point at trial and arguing post-trial that there was not sufficient evidence on that point. The Defendant is now in the position of having to live with the consequences of having made that strategic decision during trial.

The Defendant also argues that statistical evidence was required to support the Plaintiffs' pattern and practice claim. Again, this is an issue the Court has already addressed. In response to the same argument, the Court held that, despite a lack of statistical evidence, Plaintiffs had presented sufficient direct and circumstantial evidence of discrimination against older workers to establish a *prima facie* case of age discrimination. (Order of June 29, 1998, at 2-10).

Furthermore, the Defendant is hardly in a position to complain about the absence of statistical evidence. At trial, the Plaintiffs sought to introduce statistical evidence based on the data contained in an exhibit the Defendant had introduced. The Defendant then made the Court aware of problems with the its own exhibit, problems that made the evidence inaccurate and unsound. Because of these problems with the data, the Court allowed the Defendant to withdraw the exhibit, and precluded the Plaintiffs from introducing statistics based on it. While the Court declined to impose sanctions on the Defendant for this conduct, this Court is well aware of the reasons for the lack of statistical evidence in this case One of the important factors the Court considered in reaching its decision that sanctions would not be imposed on the Defendant's counsel for the introduction of the flawed evidence was the fact that there was "no indication of prejudice to either party" because of the error. (Order of October 27, 1998, at 3). Should it later turn out that this was an incorrect assumption because the absence of statistical evidence becomes important on appeal, the Court may rethink its determination that sanctions are not warranted in this case.

D. The Individual Age Discrimination Claims

The Defendant argues that each Plaintiffs' claims must be examined on an individual basis to determine whether each Plaintiff presented sufficient evidence that age was the determining factor in the actions taken against him, and that the Plaintiffs did not present sufficient evidence to establish individual claims. This argument is based on the assumption that the Plaintiffs did not establish a valid pattern and practice claim. As the Court stated above, however, this assumption

is incorrect. Therefore, the Defendant is not entitled to judgment as a matter of law on this basis.

E. Jury Instructions

The Defendant argues that it is entitled to a new trial because the Court erroneously refused to give several jury instructions the Defendant requested. The Defendant argues that the Court's refusal to give the requested jury instructions regarding pattern and practice, constructive discharge, discrimination against others, evidentiary requirements in "rule violation" cases, and mitigation of damages misled the jury. It is error for a Court to refuse to give a proposed instruction "only if the requested instruction is correct, is not adequately covered by the charge given, and deals with a point so important that failure to give the instruction seriously impaired the defendant's ability to present an effective defense." *Adams v. Sewell*, 946 F.2d 757, 767 (11th Cir. 1991). Further, while a party is entitled to have the jury instructed on its theory of the case if the evidence supports that theory, "the court is not required to give instructions in the exact language that a party's lawyer desires." *Ad-Vantage Tel. Directory Consultants, Inc. v. GTE Directories Corp.*, 849 F.2d 1336, 1349 (11th Cir. 1987).

1. Pattern and Practice

The Court gave the jury the following instruction regarding the pattern and practice issue:

> Plaintiffs allege that Liberty National engaged in a pattern and practice of age discrimination.

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> "Pattern and practice" is a phrase with special meaning. In order to assert a pattern and practice of age discrimination, Plaintiffs must establish, by a preponderance of the evidence, that age discrimination was Liberty National's standard operating procedure. In order to establish a pattern or practice of age discrimination by Liberty National, Plaintiffs must establish that unlawful age discrimination was Liberty National's regular procedure or policy. In order to determine whether or not a pattern or practice exists, the focus is not in the decisions affecting the individual Plaintiff, but on a pattern of discriminatory decision making which affected the Plaintiffs.
>
> The burden of proving a pattern and practice always rests with the Plaintiffs. A pattern or practice of discrimination might be demonstrated by examining the discrete decisions of the company, statistical evidence, direct evidence, and circumstantial evidence which evidences a pattern of discriminatory employment decision making. Liberty National may refute the pattern and practice claim by showing that Plaintiffs' evidence is inaccurate or not significant, or by showing that its employment actions were non-discriminatory

(Court's Instructions to the Jury, at 17.)

The Defendant argues that this instruction was erroneous in two respects. First, the Defendant argues that this instruction did not give the jury an adequate context for

analyzing whether a pattern and practice existed, and that the Court erred by declining to give Defendant's Proposed Instruction 3, which stated as follows:

> The number of instances of discrimination must be significant in relation to the total number of employees. Isolated acts, or acts alleged against different supervisors working in different geographical areas, will not be enough.

(Def.'s First Revised Proposed Jury Instructions.)

The decision not to include Defendant's Proposed Instruction 3 was not error, because the instruction as given covered the same point. The instructions the jury heard stated that to show pattern and practice, Plaintiffs were required to "establish, by a preponderance of the evidence, that age discrimination was Liberty National's standard operating procedure" and that "age discrimination was Liberty National's regular procedure or policy." (Court's Instructions to the Jury, at 17.) Additionally, the instruction given stated that "the focus is not on the decisions affecting the individual Plaintiff, but on a pattern of discriminatory decision making which affected the Plaintiffs." (*Id.*) Where the factors set forth in a proposed instruction are included in the instruction given, even if "in a more generalized form," the refusal to give the proposed instruction is not error. *Ad-Vantage*, 849 F.2d at 1350.

Second, the Defendant argues that the instruction given did not explain that, even if there was evidence of pattern and practice, each Plaintiff was still required to prove that

he individually was a victim of age discrimination. The Defendant argues that the Court erred by refusing to give the Defendant's Proposed Instruction 5, which states as follows:

> Even if there is abundant evidence of a pattern and practice of age discrimination against District Managers at Liberty National, each and every plaintiff must prove to you by a preponderance of the evidence that he, individually, was an actual victim of age discrimination. In other words, each plaintiff must bridge the gap between his individual claim and the broader claim of a pattern and practice of age discrimination.

(Def.'s First Revised Proposed Jury Instructions) (citations and quotations omitted).

However, the point that, in order to prevail, each Plaintiff had to demonstrate that he individually had been discriminated against was made elsewhere in the jury instructions. For instance, the instruction on constructive discharge stated that "[e]ach Plaintiff must show by a preponderance of the evidence that his working conditions were so difficult or unpleasant that a reasonable person in the Plaintiff's shoes would have felt compelled to resign." (Court's Instructions to the Jury, at 22.) Moreover, the verdict forms required the jury to find on an individual basis whether each Plaintiff had been the victim of age discrimination. The fact that the jury found that the Defendant had engaged in a pattern and practice of age discrimination, but nonetheless found against several of the Plaintiffs demonstrates that the jury understood the requirement that the Plaintiffs

individually prove that age discrimination was a determining factor in the employment actions taken against them.

2. Constructive Discharge

The Defendant argues that the Court's constructive discharge instruction did not give the jury adequate guidance on the intolerability standard. The Court gave the following instruction on this issue:

> Several Plaintiffs have claimed that they resigned or retired and that they were "constructively discharged" from Liberty National because of their age.
>
> A constructive discharge is not when an employee is actually fired, but when his employer deliberately, because of his age, makes working conditions so intolerable that the employee is forced to resign.
>
> It is not enough to show that the Plaintiff felt he had to resign. Each Plaintiff must prove by a preponderance of the evidence that his working conditions were so difficult that a reasonable person in the Plaintiff's shoes would have felt compelled to resign.

(Court's Instructions to the Jury, at 22.)

The Defendant argues that the Court erred by not giving the following proposed instructions on this issue:

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Defendant's Proposed Instruction 14:

Aggressive and close scrutiny by a new supervisor, even if it includes unfair evaluations and threats of discipline, does not justify someone's quitting and claiming discrimination forced him to quit. A person cannot use age discrimination law as a way to keep his employer from insisting on high standards of performance.

Defendant's Proposed Instruction 15:

Employers are entitled to make demands of employees and insist on high standards.

Where all employees worked in a pressure-filled environment, no particular employee can claim that difficult work conditions signify the employer's intent to force that individual to resign.

The law does not guarantee a working environment free of stress; rather it protects an employee from discriminatorily motivated, calculated effort to pressure him into resigning by imposing unreasonably harsh conditions, in excess of those faced by his co-workers.

Even when a plaintiff is singled-out for criticism or even specific negative action, such as a demotion or pay cut, that is not enough to prove constructive discharge.

> Employees have an obligation not to assume the worst, and not to jump to conclusions too fast. An employee must explore alternatives before resigning.

(Def.'s First Revised Proposed Jury Instructions) (citations and quotations omitted).

The instruction given by the Court accurately stated the law regarding constructive discharge. The Eleventh Circuit has stated that showing constructive discharge requires a plaintiff to "demonstrate that working conditions were 'so intolerable that a reasonable person in [his or] her position would have been compelled to resign.'" *Poole v. Country Club of Columbus*, 129 F.3d 551, 553 (11th Cir. 1997) (quoting *Thomas v. Dillard Department Stores, Inc.*, 116 F.3d 1432, 1433-34 (11th Cir. 1997)). The instructions requested by the Defendant would require Plaintiff to go far beyond the showing that is required in the Eleventh Circuit, and are largely based on cases from other circuits that are not binding on this Court. Moreover, they are stated in argumentative terms, more appropriate for closing argument than for jury instructions, which alone is sufficient reason for this Court to reject them. *See Adams*, 946 F.2d at 768.

3. Discrimination Against Others

The Defendant argues that it was error for the Court to allow witnesses to testify about age-related comments made by Liberty National managers about individuals other than the Plaintiffs, without giving the requested limiting instruction regarding that testimony. The Defendant argues

that the Court erred by refusing to give Defendant's Proposed Instruction 21 on this issue, which stated as follows:

> You have heard some testimony that someone at Liberty National may have made one or more comments about the age of someone other than the Plaintiffs. Even if you believe that testimony, you may not consider it in deciding whether an individual plaintiff has proven his claim of age discrimination.

(Def.'s First Revised Proposed Jury Instructions).

However, because Plaintiffs proceeded under a pattern and practice theory, this proposed instruction was not an accurate statement of the law. The testimony to which the Defendant refers went to the issue of whether the Defendant engaged in a pattern and practice of age discrimination. In *Teamsters v. United States*, 431 U.S. 324, 360 (1977), the Supreme Court rejected the contention that a finding that an employer had engaged in a pattern and practice of discrimination could not be considered in determining whether the employer had discriminated against an individual plaintiff. The Court was therefore correct in refusing to give the requested instruction.

4. Evidentiary Requirements in "Rule Violation" Cases

The Defendant states that Plaintiff Tony Agee was terminated for violating a company rule regarding written receipts. It argues that the Court erred by refusing to give the

following proposed instructions with regard to Plaintiff Agee's claim:

Proposed Instruction 18:

Liberty National has offered evidence that it terminated Mr. Agee for violating an established work rule when he gave a customer an unauthorized receipt.

Since Mr. Agee has admitted that he did violate the rule, he bears the burden to prove by a preponderance of the evidence that Liberty National's reason was false, and a pretext for age discrimination. He can only prove pretext by proving that employees younger than 40 also violated the same work rule but were treated less severely by Liberty National.

If Mr. Agee fails to make this proof by a preponderance of the evidence, you must return a verdict in favor of Liberty National on Mr. Agee's claim.

Proposed Instruction 19:

In deciding whether any employee's treatment under Liberty National's work rules can be compared with Mr. Agee, the test is whether Liberty National considered them to be similarly situated. If Liberty National applied a rule differently to people it believed to be differently situated, then there is no proof of discrimination.

> If Liberty National was unaware of other violations of the rule, you cannot find discrimination based on those violations.
>
> An employer has the right to interpret its rules as it chooses, and to make determinations as it sees fit under those rules.

(Def.'s First Revised Proposed Jury Instructions) (quotations and citations omitted).

Defendant's proposed instructions are based on the test established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which, as this Court has already held, is not the appropriate standard in a pattern and practice case. (*See* Order of June 29, 1998, at 2 n.1). The instruction proposed by the Defendant is therefore not an accurate statement of the law. Further, the Court gave the following instructions:

> To carry their ultimate burden of persuasion in an age discrimination case, the Plaintiffs must do more than simply discredit the employer's explanation, and must also present evidence capable of proving that the real reason for the employer's action was discrimination based on age.
>
> . . .
>
> The Age Discrimination in Employment Act specifically permits an employer to discharge or otherwise discipline an individual for "good cause," even if that individual is 40 or older.

(Court's Instructions to the Jury, at 23, 32.) The instructions given state in general terms the same legal principles as are contained in Defendant's requested instruction, without the inaccuracies contained in the Defendant's proposed instructions The Court did not err in refusing to give the instruction requested by the Defendant.

5. Mitigation of Damages

The Defendant argues that the instructions given did not provide the jury with adequate guidance on the issue of mitigation of damages. The following instruction was given to the jury on mitigation of damages:

> If you find that any Plaintiff is entitled to damages, his back pay award should be limited to proven economic loss. Liberty National must not be held liable for any Plaintiff's losses that were not caused by the Defendant.
>
> In determining whether to award back pay, and if so, the appropriate amount, you must consider whether a Plaintiff made reasonably diligent efforts to limit his damages by seeking employment substantially equivalent to his prior position. Interim earnings which were, or with reasonable diligence could have been, earned by a Plaintiff shall operate to reduce the back pay otherwise allowable.
>
> In order to mitigate damages, it is not necessary that the Plaintiffs seek or accept a

position which is different or inferior to the position which they allege they would have retained had they not been discriminated against by Defendant; they are only required to make reasonable efforts to find and to accept a position which is substantially equivalent to the one which they allege they would have received absent Defendant's alleged discriminatory action.

In deciding whether those positions Plaintiffs either turned down or failed to apply for were substantially equivalent to the positions they had, you should consider whether the position under consideration afforded Plaintiffs virtually identical job working conditions, and status as the positions Plaintiffs previously had.

The burden of proving a failure to mitigate damages is on the Defendant, Liberty National Life Insurance Company. To satisfy this burden, the Defendant must establish by a preponderance of the evidence (1) that the damage suffered by Plaintiffs could have been avoided or mitigated, in other words, that there were in fact substantially equivalent positions to the position that they allege they should have retained for which they were qualified, and (2) that the Plaintiffs failed to use reasonable diligence in seeking such a substantially equivalent position.

If Liberty National proves by a preponderance of the evidence that a Plaintiff unreasonably

> refused a good faith offer of reinstatement and back pay by Liberty National, back-wage damages shall be cut off from the date the offer was refused.
>
> . . .
>
> If Defendant proves that a Plaintiff unjustifiably failed to take a new job of like kind, status and pay which was available to him or failed to make reasonable efforts to find a new job, you should subtract from his damages any amount he could have earned in a new job after his discharge.

(Court's Instructions to the Jury, at 30, 33.) These instructions accurately state the law of the Eleventh Circuit regarding mitigation of damages, as it has been set forth in such cases as *Lathem v. Department of Children and Youth Servs.*, 172 F.3d 786, 794 (11th Cir. 1999); *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1527 (11th Cir. 1991); and *Walters v. City of Atlanta*, 803 F.2d 1135, 1145 (11th Cir. 1986).

However, the Defendant argues that it was error for the Court to refuse to give the following proposed instructions on the mitigation of damages issue:

> Proposed Instruction 26:
>
> If you find that a plaintiff did not make reasonable job search efforts, you may not award him backpay damages. In other words, a plaintiff may not simply abandon his job search and continue to recover back pay. A plaintiff's

entitlement to back pay is cut off if the defendant proved he made no reasonable efforts to seek substantially equivalent employment after leaving Liberty National.

Proposed Instruction 27:

A plaintiff's duty to search for substantially equivalent employment is not excused just because he reported frustration, disappointment, or lack of desire to continue working in his field of training. Therefore, if any plaintiff did not seek subsequent work in the insurance industry after leaving Liberty National, you should find that he has not made a reasonable effort to limit his damages, even if he claims he avoided insurance work because of his negative experience at Liberty National.

Proposed Instruction 28:

Any plaintiff who accepted subsequent employment in another industry without first exhausting possibilities in the insurance field has not satisfied his duty to exercise reasonable diligence in searching for suitable post-termination employment. In other words, a plaintiff is not entitled to backpay if he pursued only lower paying positions in an entirely different field of business — that person has failed to exercise reasonable diligence in finding substantially equivalent employment.

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A plaintiff also is required to make an effort to find work with substantially equivalent job responsibilities, demands, working conditions, and compensation. If he sought only less demanding jobs with lower pay, his action amounts to a willful loss of earnings, thereby reducing the amount of any award that plaintiff might receive.

Proposed Instruction 29:

After a plaintiff accepts a subsequent job, he must exercise reasonable diligence in maintaining substantially equivalent employment. In other words, after he obtains substantially equivalent work, he must then make reasonable and good faith efforts to retain the job.

If a plaintiff voluntarily quits comparable, interim employment, he fails to exercise reasonable diligence in the mitigation of damages, and his back pay must be decreased by the amount he would have earned had he not quit. For example, a plaintiff's entitlement to backpay is cut off if he voluntarily quits subsequent comparable employment for personal reasons or as a matter of personal convenience.

In addition, a plaintiff's right to backpay also is cut off if he is terminated from subsequent comparable employment for failing to perform his job duties, for failing to produce as expected, or for violating work rules.

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Proposed Instruction 30:

> If you find that any of the plaintiffs was unable to work for any period of time subsequent to the cessation of their employment with the defendant, that plaintiff is not entitled to receive any back pay or benefits for that time period.
>
> Thus, if any plaintiff was physically unable to perform any job duties at any time after leaving Liberty National, he is not entitled to any award of backpay or other damages during that period of disability.

(Def.'s First Revised Proposed Jury Instructions) (quotations and citations omitted).

Several of the Defendant's proposed instructions state that if a Plaintiff did not mitigate his damages, he was not entitled to backpay damages or his entitlement to backpay damages was cut off from the time of his failure to mitigate forward. This is not an accurate statement of the law; instead, the law requires only that the amount a Plaintiff would have earned had he been reasonably diligent in pursuing substantially equivalent alternate employment be deducted from the amount of back pay awarded a Plaintiff who failed to mitigate his damages. *See Walters*, 803 F.2d at 1145; *see also* 42 U.S.C. § 2000e-5(g) (stating that the "amount earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise awardable").

The Court did not err in refusing to give the requested instructions, both because the law on mitigation of damages was adequately covered by the extensive instructions given on that issue, and because the proposed instructions were themselves erroneous. *See Adams*, 946 F.2d at 767. Furthermore, the instructions requested by the Defendant are argumentative, which itself is an independent reason that their exclusion was proper. *See id.* at 768

F. Admission of Evidence

Liberty National argues that the admission of time-barred evidence, evidence of discrimination against others, and evidence regarding stray remarks was error, entitling it to a new trial. All of the evidence of which the Defendant complains was admissible in support of the Plaintiffs' pattern and practice claim or to demonstrate that a hostile environment existed in the workplace.

1. Time-Barred Evidence

With respect to the evidence the Defendant characterizes as time-barred, the Defendant once again argues that this case should not have proceeded as a collective action, and that the requirements for establishing a continuing violation have not been met. The Court has already addressed these arguments above and in several previous Orders, and will not do so further here, except to state that the Defendant's argument is without merit.

2. Evidence of Discrimination Against Others

Defendant argues that the admission of evidence regarding discrimination against non-Plaintiffs Woody McKown and Don Whitman and against agent applicants was error and prejudiced the Defendant. With respect to a claim of age discrimination, however, "[t]here is no proscription of evidence of discrimination against other members of the plaintiff's protected class; to the contrary, such evidence may be highly probative, depending on the circumstances." *Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1106, 1109 (11th Cir. 1995). The instant case is a pattern and practice case, which placed the burden on Plaintiffs to prove by a preponderance of the evidence that the Defendant engaged in age discrimination as a part of its standard operating procedure. Evidence of Defendant's discrimination against others was highly relevant for that purpose, and its probative value was not substantially outweighed by the danger of unfair prejudice. *See* Fed. R. Evid. 403. Admission of that evidence was therefore not error.

3. Stray Remarks

The Defendant argues that it was error to admit evidence of "stray remarks," or discriminatory comments that were not made by a decisionmakers, related to the decisions at issue in this case, close in time to those decisions. The Defendant is correct that "stray remarks" cannot be direct evidence of discrimination. "For statements of discriminatory intent to constitute direct evidence of discrimination, they must be made by a person involved in the challenged decision." *Trotter v. Board of Trustees*, 91 F.3d 1449, 1453

(11th Cir. 1996); *see also, Eskra v. Provident Life & Accident Ins. Co.*, 125 F.3d 1406, 1411 (11th Cir. 1997).

However, even statements that cannot be offered as direct evidence of discrimination because they are time-barred or are not directly related to a plaintiff "may provide circumstantial evidence to support an inference of discrimination." *Ross v. Rhodes Furniture, Inc.*, 146 F.3d 1286, 1291 (11th Cir. 1998); *see also, Walden v. Georgia Pacific Corp.*, 126 F.3d 506, 521 (3d Cir. 1997) (stating that "stray remarks by nondecisionmakers may be properly used by litigants as circumstantial evidence of discrimination"). In this case, testimony of what could be considered stray remarks was particularly relevant, because this case is a pattern and practice case. Further, discriminatory remarks, even by non-decisionmakers can "constitute evidence of the atmosphere in which the employment decision was carried out." *Walden*, 126 F.3d at 521. Therefore, it was not error to admit evidence of what the Defendant characterizes as "stray remarks."

G. Damages

In this case, the verdict form specifically asked the jury whether the Plaintiffs proved "by a preponderance of the evidence that Liberty National's conduct toward [Plaintiffs] was done with knowledge that it was a violation of the Age Discrimination in Employment Act or with reckless disregard as to whether it was a violation of the Age Discrimination in Employment Act." (*See* Verdict Forms.) The jury found that the Defendant's discrimination against all of the successful Plaintiffs was willful. (*See id.*) Nonetheless, the Defendant

argues that it is entitled to judgment as a matter of law with respect to the jury's liquidated damages, punitive damages, and pain and suffering verdicts, because there was insufficient evidence to support a finding that the Defendant acted willfully.

This Court has previously discussed at length the evidence that demonstrates willfulness on the part of the Defendant, particularly evidence demonstrating that age discrimination was not an isolated occurrence, but was instead a pattern and practice of the Defendant. (*See* Order of June 29, 1998, at 4-10). The Court will not reiterate that earlier discussion here, except to state that the evidence presented by the Plaintiffs "demonstrated that older employees were specifically targeted because of Defendant's decision makers' perceptions of the attitudes, costs, and vulnerabilities associated with their aged employees." (*Id.* at 4.) There was more than sufficient evidence presented in this case to demonstrate that the Defendant acted willfully in violating employment discrimination law.

The Defendant's further arguments on the issue of damages duplicate arguments made in Defendant's motion for remittitur or a new trial on damages Those arguments will be discussed below in connection with that motion.

In sum, the Court has found no error on any of the grounds suggested by Defendant, and no reason to reverse any of its earlier rulings. This case appropriately went forward as a collective action based on a pattern and practice theory. The jury's verdict was supported by substantial evidence in all respects. The instructions given to the jury were accurate

as to the law, and Defendant was not entitled to any instructions which were not given. The evidence admitted over Defendant's objection was properly admitted. Therefore, Defendant's motion for judgment as a matter of law or, alternatively, for a new trial, on the issue of liability will be denied.

III. Motion for Remittitur or a New Trial on Damages (Docket No. 392)

Defendant moves for remittitur or a new trial as to damages The Defendant argues that the amount of backpay damages awarded to the successful Plaintiffs, the amount of punitive damages awarded to Plaintiff Hipp, and the amount of pain and suffering damages awarded to Plaintiffs Hipp and Stein were excessive. "A grossly excessive award may warrant a finding that the jury's verdict was swayed by passion and prejudice and thus necessitate a new trial." *Goldstein v. Manhattan Indus.*, 758 F.2d 1435, 1447 (11th Cir. 1985). "However, a new trial should be ordered only when the verdict is so excessive as to shock the conscience of the court." *Id.*; *see also, Carter v. Decisionone Corp.*, 122 F.3d 997, 1006 (11th Cir. 1997). "When the jury's verdict is within the bounds of possible awards supported by the evidence, its award should not be disturbed." *Carter*, 122 F.3d at 1006.

A. Backpay

The Defendant argues for remittitur or a new trial on the award of backpay damages on the grounds that: (1) the awards were based on unreliable expert testimony; (2) the damages

awarded did not account for the Plaintiffs' failure to mitigate their damages; (3) no backpay should have been awarded to Plaintiffs Lee and Hipp for the periods during which each was incapacitated; (4) any award of backpay to Plaintiff Stein was improper, because he committed a termination offense; and (5) the amounts distributed as lump sum pension and retirement benefits should have been deducted from the backpay awards. The jury awarded the successful Plaintiffs the following amounts as backpay:

PLAINTIFF	BACKPAY
Tony Agee	$191,043
Harold Carter	$227,465
David Hipp	$337,592
James Lee	$673,819
Brad Stein	$403,779
Mike Stell	$196,390
Blake Tuggle	$7 9,742

1. Expert Testimony

The Defendant argues that these awards were excessive because they were based on unreliable expert testimony that should have been excluded. At trial, Plaintiffs presented the expert testimony of Marvin Beasley, a C.P.A., regarding their damages. Initially, the Defendant objected to both the testimony and the expert reports prepared by Mr. Beasley.

Before Mr. Beasley testified, however, the parties reached a stipulation that Mr. Beasley's testimony would be admitted, but that the expert reports he prepared would not be offered as evidence, and that the Plaintiffs would offer a chart containing Mr. Beasley's conclusions regarding their damages. Accordingly, the back pay reports were never moved into evidence, and Mr. Beasley's testimony and the chart were offered without any objection from the Defendant. The Defendant offered no testimony or argument regarding damages, stating only in its closing argument with regard to damages that "We're not going to argue with you, because we're saying we don't owe these people a thin dime, a red cent, a copper, a farthing, whatsoever."

Following the trial, the Plaintiffs sought front pay They supported their requests for front pay with front pay reports, also prepared by Mr. Beasley The Court found that the requested front pay awards were unduly speculative, but allowed the Plaintiffs the opportunity to provide the Court with revised front pay reports. (*See* Order of November 20, 1998, at 23.) The Court found that it could not use the revised reports provided by the Plaintiff, because the methods used to calculate front pay were "inaccurate and unsound." (*See* Order of March 11, 1999, at 4-5.)

The Defendant now argues that Mr. Beasley's calculations regarding backpay were unreliable, because they used the same flawed methodologies that were used in the front pay reports. Once again, however, the Defendant is hampered by one of its own strategic decisions. The Defendant did not object to Mr. Beasley's testimony at the time that it was offered. Under Eleventh Circuit precedent,

the Defendant waived this objection by its failure to object to the expert testimony when it was offered. *See Christopher v. Cutter Laboratories*, 53 F.3d 1184, 1192 (11th Cir. 1995). The statement the Eleventh Circuit made in the *Christopher* case applies equally here:

> What occurred in this case provides a classic example of why contemporaneous objections need to be made. Some of [the expert witness]'s testimony could have been read to be inaccurate and inconsistent, but he was afforded no opportunity to clarify the apparent inconsistencies. If [the defendant] believed that [the expert witness]'s testimony was statistically invalid, it should have objected to that testimony, giving him the chance to explain his answers. Objecting also would have provided the district court with the opportunity not only to make a ruling on the accuracy and admissibility of the challenged testimony but also to clarify that testimony.

Id.

With no contemporaneous objection having been made to Mr. Beasley's damages testimony, the admission of that testimony can be reviewed only for plain error. *See id.* "Plain errors are obvious and substantial errors which seriously affect the fairness, integrity or public reputation of judicial proceedings." *Id.* (quoting *United States v. Hope*, 901 F.2d 1013, 1020 (11th Cir. 1990)). The Court finds no basis in the record to find that the admission of Mr. Beasley's reports regarding backpay was plain error. The Court is not certain

that Mr. Beasley's methods of calculating back pay were the best available, although the Defendant's failure to object on that ground has left the Court with no basis on which to properly evaluate that question. However, if erroneous, the admission of Mr. Beasley's testimony was not an error of the magnitude that it could be considered a "substantial error" that seriously affected the proceeding's fairness, integrity or public reputation.

This is particularly true given the remedial nature of the claims involved. Consistent with the goals of the ADEA, "[b]ackpay should be awarded even where the precise amount of the award cannot be determined, with any ambiguities being resolved against the employer." *Wooldridge v. Marlene Indus. Corp.*, 875 F.2d 540, 549 (6th Cir. 1989); *see also, Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 156 (3d Cir. 1999). That there was some conjecture involved in Mr. Beasley's backpay calculations, the Court has no doubt. However, while an award of front pay may be denied where it is overly speculative, Plaintiffs who have proven that they were the victims of age discrimination are unquestionably entitled to backpay, even if there is a certain level of speculation involved.

2. Mitigation of Damages

The Defendant argues that the backpay awards did not account for Plaintiffs Lee, Carter, Hipp, and Agee's failure to mitigate their damages. It was the Defendant's burden to establish with respect to each Plaintiff that he failed to mitigate his damages. *See EEOC v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1251-52 (11th Cir. 1999).

"Specifically, the employer must show that 'comparable work was available and the claimant did not seek it out.' " *Weaver v. Casa Gallardo*, 922 F.2d 1515, 1527 (11th Cir. 1991) (quoting *Sellers v. Delgado Community College*, 839 F.2d 1132, 1139 (5th Cir. 1988)).

The Defendant presented no evidence at trial demonstrating that substantially equivalent employment was available to any of these Plaintiffs. However, the Defendant argues that the failure of Plaintiffs Lee, Carter, and Agee to seek substantially equivalent employment relieved it of its burden to demonstrate that such employment was available. Where "an employer proves that the employee has not made reasonable efforts to obtain work, the employer does not also have to establish the availability of substantially comparable employment." *Weaver*, 922 F.2d at 1527 (quoting *Sellers*, 839 F.2d at 1139). In this case, however, the Defendant has not established that these Plaintiffs failed to make reasonable efforts to obtain work.

a. Plaintiff Lee

With respect to Plaintiff Lee, the Defendant asserts that "[i]t is undisputed that James Lee did not make reasonable efforts to mitigate his damages." (Def. Mem. at 7), in that Plaintiff Lee has now retired. Plaintiffs, however, vigorously dispute the Defendant's contention, pointing to Plaintiff Lee's testimony that after he left the Defendant's employ, he applied for a license to sell insurance for Protective Life Insurance Company, and solicited a "big case" for that company. (Tr. June 2, 1998, at 170-71.) Plaintiff Lee testified that his efforts to find employment were then hindered for several

months by an injury that required surgery and rehabilitation. (Tr. June 2, 1998, at 171.)

The Defendant did not cross-examine Plaintiff Lee about what efforts he made to find another job prior to obtaining a license from Protective Life Insurance Company, about his employment at Protective, or about any other efforts he made to obtain employment in the insurance field or in any other field. Further, that information was not otherwise in the evidence that was before the jury. The fact that Plaintiff Lee's decision to retire, as was reflected in the front pay reports, would have barred him from receiving front pay, is not relevant to the question of the backpay award. No evidence of that decision, the reasons for it, or when it was made, was before the jury. The Defendant did not establish that Plaintiff Lee failed to make reasonable efforts to obtain work, and was therefore not excused from its burden to establish that substantially comparable employment was available to him.

b. Plaintiff Carter

The Defendant argues that Plaintiff Carter failed to mitigate his damages, because he pursued only lower-paying positions in other occupations. Plaintiff Carter's testimony was that after he left the Defendant, he looked for work, and worked for a short time as an agent for Smith Murphrey Financial Consultants, then sold radio advertising, then became a truck driver, until he went back into the insurance industry again in 1997. He worked for an insurance company called American General for ten months, until the end of December 1997. Plaintiff Carter stated that the reason he left American General was because of "what had happened to

me with Liberty National. I just never could get over that to where I could put my whole heart into the insurance business again." (Tr. June 15, 1998, at 32.) In January 1998, he went back to being a truck driver until April 1998, when he became a car salesman. The Defendant did not cross-examine Plaintiff Carter regarding what efforts he had made to obtain substantially equivalent employment before he took positions outside the insurance industry.

With respect to the period ending when Plaintiff Carter left American General, the Defendant did not present any evidence establishing that Plaintiff Carter did not make reasonable efforts to seek comparable employment. However, Plaintiff Carter's testimony demonstrates that he voluntarily quit his job at American General at the end of December 1997. The Defendant argues that Plaintiff Carter thus falls within the rule requiring that where "a plaintiff has obtained employment equivalent to that from which he was excluded by the defendant, and quits without adequate reason, the backpay award must be offset by the amount the plaintiff would have earned had he kept the job." *Griffin v. George B. Buck Consulting Actuaries*, 566 F. Supp. 881, 882 (S.D. N.Y. 1983).

The rule on which the Defendant relies, however, does not appear to apply here, because the record does not establish that the position with American General was in fact substantially equivalent to Plaintiff Carter's position with the Defendant. "'Substantially equivalent employment' is employment that affords virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status to those available to employees holding

the position from which [the employee] has been discriminatorily terminated." *Weaver*, 922 F.2d at 1527.

Plaintiff Carter earned $25,441.00 in the ten months that he worked for American General. That rate of pay equates to an annual salary of approximately $30,529.00, or less than half of what Plaintiff Carter made while employed by the Defendant. Further, the only information in the record regarding Plaintiff Carter's position with American General is that American General is an insurance company. There is no evidence as to the promotional opportunities, job responsibilities, or working conditions available to Plaintiff Carter in that position. Hence, Plaintiff Carter's position with American General was clearly not substantially equivalent to his position with the Defendant in terms of pay, and it is impossible to determine from the record whether that position was substantially equivalent in other respects.

The rule that does apply to Plaintiff Carter's case was stated in *Weaver*, in which the Eleventh Circuit held that it is not a failure to mitigate for plaintiff who is unable to find substantially equivalent employment to "'lower his sights' and accept noncomparable employment." 922 F.2d at 1527. The *Weaver* court stated further that where a plaintiff has accepted noncomparable employment, he is not required to remain in the position despite dissatisfaction with it. *See id.*

Moreover, even if the rule for which the Defendant argues did apply in this case, its application would not appear to help the Defendant. Plaintiff Carter's change of employers from American General to the trucking company appears to have *increased* Plaintiff Carter's rate of pay. At an annual

salary of approximately $30,529.00. Plaintiff Carter would have earned approximately $587.00 per week at American General. Plaintiff Carter's earnings as a truck driver ranged from $287.00 to $905.00 per week, averaging approximately $617.00 per week. To offset the backpay award by the amount Plaintiff Carter would have earned had he remained with American General, as the Defendant argues should be done, rather than with the amount he actually earned as a truck driver, would actually increase the amount of backpay to which Plaintiff Carter is entitled, surely not the result the Defendant seeks.

c. Plaintiff Agee

Finally, the Defendant argues that Plaintiff Agee failed to pursue employment in the insurance industry. After he left the Defendant's employ, Plaintiff Agee sold insurance to federal employees, then worked as a mortgage broker, finally becoming a salesman for an oil company. Without pointing to any evidence that Plaintiff Agee failed to seek employment in the insurance industry, the Defendant argues that Plaintiff Agee did not satisfy his duty to exercise reasonable diligence in seeking subsequent comparable employment. The Court was unable to find any such evidence in the record to support Defendant's argument. It was Defendant's burden to establish that Plaintiff Agee failed to mitigate, and it did not meet that burden

3. Periods of Incapacitation

Plaintiff Lee testified that in the time after he left the Defendant's employ, he was unable to work for several

months due to an injury that required surgery and rehabilitation. There was also evidence that Plaintiff Hipp required surgery that prevented him from working full time after he no longer worked for the Defendant. The Defendant argues that backpay should not have been awarded during these periods, because these Plaintiffs were not physically capable of performing their job duties during their periods of incapacitation. Back pay damages are generally available only for periods during which a plaintiff was " 'available and willing to accept substantially equivalent employment' elsewhere; courts exclude periods where a plaintiff is unavailable to work, such as periods of disability, from the back pay award." *Lathem v. Department of Children and Youth Servs.*, 172 F.3d 786, 794 (11th Cir. 1999) (quoting *Miller v. Marsh*, 766 F.2d 490, 492 (11th Cir. 1985)).

Plaintiffs point out, however, that evidence was presented at trial that the among the benefits provided by the Defendant was short term disability and wage continuation insurance. Had Plaintiffs Lee and Hipp remained in the Defendant's employ, they would have received their wages and benefits during their respective periods of incapacitation. It would be inconsistent with the "purpose of relief under the federal employment anti-discrimination laws," which "'is to make persons whole for injuries suffered on account of unlawful employment discrimination,' " *EEOC v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1251 (11th Cir. 1999), (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-19 (1975)), to deny backpay during periods of incapacitation, when the Plaintiffs would have been compensated during those periods had they remained in the Defendant's employ.

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4. Commission of a Termination Offense

The Defendant argues that under the rule stated in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), Plaintiff Stein is not entitled to backpay damages. In *McKennon*, the Supreme Court considered the effect on an ADEA suit of an employer's learning, after the suit begins, of misconduct that would have led to an employee's termination if the employer had known about it previously. The Court held that after-acquired evidence of wrongdoing does not bar an ADEA suit, but may affect the remedies available to the plaintiff. *See id.* at 359-360. It stated that as a general rule neither reinstatement nor front pay would be appropriate in such a case. *See id.* at 361-62. Back pay, however, would still be available, but might be limited:

> The beginning point in the trial court's formulation of a remedy should be calculation of backpay from the date of the unlawful discharge to the date the new information was discovered. In determining the appropriate order for relief, the court can consider taking into further account extraordinary equitable circumstances that affect the legitimate interests of either party.

Id. at 362. Before an employer can "rely on after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee would in fact have been terminated on those grounds alone if the employer had known about it at the time of the discharge." *Id.*

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The Defendant states that Plaintiff Stein committed a termination offense while still employed by the Defendant. Several months prior to Plaintiff Stein's resignation, he became licensed to sell insurance for Commercial Insurance Consultants [CIC] The Defendant points to testimony of Plaintiff Hipp that even before Plaintiff Stein left his job with the Defendant, Plaintiff Stein spent several hours per week working for CIC. (*See* Tr. June 10, 1998, at 69-70.) The Defendant's Field Procedure Manual states that engaging in another occupation and applying for a license to sell insurance with another company are both termination offenses. Further, the Defendant's assistant general counsel in his trial testimony confirmed that violation of these rules would result in termination. (*See* Tr. June 24, 1998, at 37-40) The Defendant has demonstrated that Plaintiff Stein's offense would have led to his termination if it had known of it.

Under the rule in *McKennon*, the Defendant is thus entitled to rely on the after-acquired evidence of Plaintiff Stein's misconduct. Because no front pay was awarded in this case, the application of that portion of the *McKennon* rule has no effect on Plaintiff Stein's recovery. With respect to backpay, the starting point of this Court's analysis must be to limit the award of backpay to the period from the date of Plaintiff Stein's discharge to the date the Defendant discovered Plaintiff Stein's misconduct. *See McKennon*, 513 U.S. at 362. It is unclear from the record before the Court when the Defendant learned of Plaintiff Stein's licensure by CIC. However, the Court need not resolve that issue, because the next step of the analysis is determinative in this case.

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According to *McKennon*, a trial court may take into account "extraordinary equitable circumstances that affect the legitimate interests of either party" where after-acquired evidence limits the recovery for age discrimination. *Id.* The Court finds that such extraordinary circumstances are present here The Court has exhaustively reviewed the caselaw that has followed *McKennon*. Employers that have successfully argued for limitation of backpay due to after-acquired evidence of wrongdoing have offered evidence of conduct such as: stealing confidential documents, *see McKennon*, 513 U.S. at 355; stealing and destroying the employer's property; *see Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756 (9th Cir. 1996); committing plagiarism, *see Castle v. Rubin*, 78 F.3d 654, 658 (D.C. Cir. 1996); falsely denying having been convicted of a drug offense on an employment application, *see Wallace v. Dunn Construction Co.*, 62 F.3d 374, 377 (11th Cir. 1995); and sexually harassing a subordinate employee, *see Ricky v. Mapco, Inc.*, 50 F.3d 874, 875 (10th Cir. 1995).

In contrast, although the actions Plaintiff Stein took were a violation of company rules, they would not otherwise have been wrongful. More importantly, the actions were an effort by Plaintiff Stein to mitigate his damages. Plaintiff Stein testified that he did not sell any policies for CIC while still employed by the Defendant. He signed the contract with CIC before he left the Defendant's employ because he was told that if he was going to join, it had to be then. He stated that he took the opportunity when it was offered because he knew he was leaving the Defendant. (*See* Tr. June 4, 1998, at 245-46.) Plaintiff Stein would not have needed to find other employment, and, therefore, would not have had reason to

work for CIC, had it not been for the Defendants' unlawful discrimination. These factors take Plaintiff Stein's case out of the ordinary. They also persuade the Court that the jury's award of backpay to Plaintiff Stein should not be disturbed. It would not be fair to penalize Plaintiff Stein and benefit the Defendant because of actions caused directly by the Defendant's unlawful conduct

The Defendant further argues, based on statements contained in documents entered in evidence as an exhibit, that Plaintiff Stein failed to mitigate his damages, because he failed to produce enough business, and was fired from CIC. However, the Defendant neglects to mention that its contention is directly contradicted by Plaintiff Stein's testimony, which was that he was not fired, and that his employment with CIC ended because CIC ended the entire program. (*See* Tr. June 4, 1998, at 246). The jury was offered conflicting evidence, and was given the instructions discussed above regarding mitigation of damages. The Court sees no reason to reverse the jury's apparent resolution of this conflict in the evidence.

5. Lump Sum Pension and Retirement Benefits

The Defendant argues that the lump sum pension and retirement benefits received by Plaintiffs should be deducted from the amount of backpay awarded to them. The Defendant states that "[f]ederal courts uniformly agree that lump sum pension, profit sharing, and retirement payments issued to employees upon termination must be deducted as an offset against any backpay award owed to an employment discrimination plaintiff." (Def. Mem. at 11) (citing

Brunnemann v. Terra Int'l, 975 F.2d 175, 179 & n.7 (5th Cir. 1992); *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 966 (4th Cir. 1985); *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 77-78 (2d Cir. 1983); *EEOC v. Northwest Airlines*, 1987 U.S. Dist. LEXIS 14942, at *2-3 (W.D. Wash. Nov. 9, 1987)). As an initial matter, the Court would point out that Defendant's statement misrepresents the state of the law, overstates the holdings of the cases it describes, and ignores Eleventh Circuit caselaw that, while not directly on point, is closely related. The Court has no way of knowing whether this inaccuracy reflects a deliberate attempt to mislead the Court or is merely the result of sloppy research, but neither is acceptable to this Court.

The Eleventh Circuit has not addressed the issue of whether pension benefits must be deducted from backpay awarded to employment discrimination plaintiffs. The federal courts that have addressed this issue appear to be split. *Compare Brunnemann*, 975 F.2d at 179 & n.7 (pension benefits deducted); *Fariss*, 769 F.2d at 966 (same); *Hagelthorn*, 710 F.2d at (same); *Northwest Airlines*, 1987 U.S. Dist LEXIS 14942, at *2-3 (same), *with Smith v. World Ins. Co.*, 38 F.3d 1456, 1465-66 (8th Cir. 1993) (pension benefits may not be deducted from backpay as a general rule, but may be deducted where backpay award includes "employer pension contributions payments which would have been made, but for the unlawful discharge"), *EEOC v. O'Grady*, 857 F.2d 383, 389 (7th Cir. 1988) (district court has discretion to offset pension benefits or not) *McDowell v. Avtex Fibers, Inc.*, 740 F.2d 214, 217 (3d Cir. 1984) (pension benefits not deducted from backpay award), *rev'd on other grounds*, 469 U.S. 1202 (1985). This split appears to be part of a larger

division among the circuits over the issue of "whether collateral benefits should be subtracted from backpay awards in employment discrimination cases." *Lussier v. Runyon*, 50 F.3d 1103, 1107 (1st Cir. 1995) (stating that circuits are split on the collateral benefits issue and collecting cases).

While the Eleventh Circuit has not ruled on the precise issue before this Court, it has decided the issue of whether collateral benefits generally may be deducted from backpay awards in employment discrimination cases. In *Brown v. A.J. Gerrard Mfg. Co.*, 715 F.2d 1549, 1550 (11th Cir. 1983), the Eleventh Circuit held that deduction of unemployment benefits in employment discrimination cases "should be consistently disallowed" More recently, the Eleventh Circuit extended this holding to include Social Security benefits. *See Dominguez v. Tom James Co.*, 113 F.3d 1188, 1191 (11th Cir. 1997). In *Dominguez*, the Eleventh Circuit stated that it "agree[d] with the position of the Third Circuit in *Maxfield [v. Sinclair International*, 766 F.2d 788 (3d Cir. 1985).]" *Dominguez*, 113 F.3d at 1191. In *Maxfield*, the Third Circuit stated that the reasoning for disallowing the deduction of unemployment benefits, Social Security benefits, and pension benefits from backpay was the same, stating that:

> there are no significant discernable differences between Social Security benefits and pension benefits for this purpose. All would ordinarily be received by an employee . . . only after s/he has been discharged or involuntarily retired. . . . [W]e see no reason why the benefit of the collateral funds should shift to the defendant. The quotation relied on in *McDowell* is equally applicable here:

> Since no consideration has been given or should be given to collateral losses in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received.
>
> *NLRB v. Gullet Gin Co.*, 340 U.S. 364 *quoted in McDowell*, 740 F.2d at 217-18) (footnote omitted). As between the employer, whose action caused the discharge, and the employee, who may have experienced other noncompensable losses, it is fitting that the burden be placed on the employer

Maxfield, 766 F.2d at 795.

Far from there being the "uniform rule" described by the Defendant, numerous federal courts have held that pension benefits may not be deducted from backpay awards in employment discrimination cases. While the Eleventh Circuit has not addressed this precise issue, it has clearly come down on the side of disallowing the deduction of collateral benefits from backpay awards with respect to Social Security and unemployment benefits In doing so, it has endorsed reasoning that would apply the same rule to pension benefits. This Court agrees with the reasoning of the Third Circuit with regard to pension benefits being indistinguishable from Social Security and unemployment benefits for purposes of a backpay award, and predicts that the Eleventh Circuit will do so as well, if it has not already done so implicitly with its holding in *Dominguez*.

In any event, even if the rule for which the Defendant argues were the law of this circuit, it is not clear that it would apply in this case. The pensions of all of the Plaintiffs had already vested. Defendant would have been required to pay Plaintiffs their pensions upon retirement, even if it had not discriminated against them. Further, the pension benefits to which Plaintiffs would have been entitled by that point would have been significantly larger than the amounts the Plaintiffs actually received. The backpay awarded to the Plaintiffs did not include any components to account for the pension payments the Defendant would have had to pay if it had not unlawfully discriminated against Plaintiffs. To deduct the amount of the pension benefits from the backpay awarded would therefore provide a "windfall" to the Defendant, in effect rewarding the Defendant for its discrimination. The award of backpay to the Plaintiffs will not be reduced by the amount of pension benefits paid out to them.

In sum, neither a new trial nor a remittitur is necessary with regard to the award of backpay, because the jury's award of backpay was within the bounds of possible awards supported by the evidence. The amount awarded closely correlated with the figures provided by Plaintiffs' expert witness. Further, Plaintiffs offered as evidence voluminous financial records, and each Plaintiff testified regarding his economic losses. Even without the expert testimony, the documents and testimony would have provided a basis for the amount awarded to the Plaintiffs. It was the Defendant's burden to establish that the Plaintiffs failed to mitigate damages, and the Defendant failed to carry that burden. The Defendant is not entitled to have the award reduced to account for the periods during which Plaintiffs Hipp and Lee were

incapacitated, because those Plaintiffs would have been compensated during those periods had they remained in the Defendant's employ. Because of the equities involved, the award of backpay to Plaintiff Stein will not be limited to account for after-acquired evidence of misconduct by Plaintiff Stein. Finally, the amounts Plaintiffs received as lump sum distributions of their pension benefits will not be deducted from the award of backpay.

B. Punitive Damages

The jury awarded Plaintiff Hipp punitive damages in the amount of $5,000,000.00. Consistent with Florida's statutory cap on punitive damages awarded under the Florida Civil Rights Act [FCRA], Florida Statutes Section 760.11(5), this Court has already reduced the amount of this award of punitive damages to $100,000.00. (*See* Order of March 11, 1999, at 9.) The Defendant now argues that the award of punitive damages should be set aside entirely or reduced even further. The Defendant argues, based on *Kolstad v. American Dental Ass'n*, 139 F.3d 958 (D.C. Cir. 1998), that punitive damages should have been awarded only if Plaintiff Hipp had demonstrated "egregious conduct" toward him on the part of the Defendant. Although that case is a Title VII case and the award of punitive damages was made with respect to Plaintiff Hipp's FCRA claim, "Florida courts have held that decisions construing Title VII are applicable when considering claims under the Florida Civil Rights Act, because the Florida act was patterned after Title VII." *Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998).

However, the authority on which the Defendant relies has since been reversed by the Supreme Court. *See Kolstead v. American Dental Ass'n*, 119 S. Ct. 2118 (1999). The Supreme Court stated in *Kolstead* that to be liable for punitive damages, "an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages." *Id.* at 2124. While the Court recognized that "[c]onduct warranting punitive awards has been characterized as 'egregious' because of the defendant's mental state," it held that there is no requirement that "employers must engage in conduct with some independent 'egregious' quality before being subject to a punitive award." *Id.* at 2126.

The jury found in this case that the Defendant's conduct toward Plaintiff Hipp "was done with knowledge that it was a violation of the Age Discrimination in Employment Act or with reckless disregard as to whether it was a violation of the Age Discrimination in Employment Act." (Verdict Form for David Hipp, at 4). This is sufficient to meet the standard set forth by the Supreme Court in *Kolstead* for an award of punitive damages. Further, the Court would note that the evidence presented at trial would have been sufficient to demonstrate that the Defendant had engaged in "egregious conduct," if that had in fact been the applicable standard. This Court has already reduced the award of punitive damages to $100,000.00; Defendant's motion to further reduce or set aside this award will be denied.

The Court must also express its concern with the fact that, here again, the Defendant has misrepresented the state of the law on this issue. The Defendant represents in its brief

that *Kolstead* explains that "federal courts uniformly agree that punitive damages cannot be awarded unless evidence of the defendant's culpability exceeds a mere showing of intentional discrimination." (Def. Mem. at 12-13.) Instead, the case on which the Defendant relies explicitly recognizes that there is a split in the circuits on this issue, stating that while four circuits had up to that point "held that egregious misconduct beyond mere intent to discriminate is required for punitive damages . . . [t]hree other circuits have held that a finding of intentional discrimination, without more, is enough to put the question of punitive damages before the jury." *Kolstead*, 139 F.3d at 962. The Court would emphasize again to Defendant's counsel its displeasure with misrepresentations to this Court.

C. Pain and Suffering Awards

The Defendant moves for remittitur or a new trial with respect to the pain and suffering awards to Plaintiffs Hipp and Stein. The jury awarded Plaintiff Hipp $1,175,000.00 and Plaintiff Stein $2,700,000.00 for their pain and suffering, pursuant to those Plaintiffs' FCRA claims. The Defendant argues that the evidence presented at trial was insufficient to support these awards.

Florida state law governs the substantive question of whether the verdict in this case is excessive, while federal law governs the "slightly different procedural question" of whether the Defendant is entitled to a new trial if the damages are found to be excessive. *Lowe v. General Motors*, 624 F.2d 1373, 1383 (5th Cir. 1980); *see also Hattaway v. McMillian*, 903 F.2d 1440, 1450 (11th Cir. 1990). The rule in Florida is

that "[t]he court should never declare a verdict excessive merely because it is above the amount which the court itself considers the jury should have allowed. The verdict should not be disturbed unless it is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate." *Bould v. Touchette*, 349 So. 2d 1181, 1184 (Fla. 1977); *see also*, *Ashcroft v. Calder Race Course*, 492 So. 2d 1309, 1314 (Fla. 1986). "[W]here the evidence on the issues ... is in conflict, and the verdict found thereon is not manifestly against the weight of the evidence, the court will not interfere and set aside the verdict of the jury." *Wackenhut Corp. v. Canty*, 359 So. 2d 430, 434 (Fla. 1978). "In other words, the trial judge does not sit as a seventh juror with veto power. ... Not every verdict which raises a judicial eyebrow should shock the judicial conscience." *Id.* Likewise,

> Although a verdict may be for considerably more or less than in the judgment of the court it ought to have been, still the court should decline to interfere, unless the amount is so great or small as to indicate that the jury must have found it while under the influence of passion, prejudice, or gross mistake. In order to shock the sense of justice of the judicial mind the verdict must be so excessive or so inadequate so as to at least imply an inference that the verdict evinces or carries an implication of passion or prejudice, corruption, partiality, improper influences, or the like.

Lassiter v. International Union of Operating Eng'rs, 349 So. 2d 622.

Under this standard, the Court finds that it cannot set aside or reduce the award of pain and suffering damages to Plaintiffs Stein and Hipp. The amount might be larger than the Court itself would have awarded, but given the evidence the jury heard as to the effect that the Defendant's discrimination had on these Plaintiffs, it was within the reasonable range in which the jury could operate. There is no implication from the verdict that the jury was influenced by prejudice or improper motive. For these reasons, the Court will deny the Defendant's motion for remittitur or a new trial as to the award of pain and suffering damages Accordingly, it is:

ORDERED that:

1. Plaintiff's motion for attorneys' fees (Docket No. 390) be **DEFERRED;** and will be considered only after all appeals are resolved, if necessary;

2. Defendant's motion for remittitur or for a new trial on the issue of damages (Docket No. 392) be **DENIED;** and

3. Defendant's motion for judgment as a matter of law or for a new trial and supporting memorandum (Docket No. 394) be **DENIED.**

DONE AND ORDERED in Chambers, in Tampa, Florida this 17th day of August, 1999.

s/ Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
Chief United States District Judge

APPENDIX C — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED AUGUST 14, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99-10699-CC

DAVID HIPP, and all others similarly situated; HARRY W. MCKOWN, JR., and all others similarly situated; BRAD STEIN, all others similarly situated; MIKE STELL, and all others similarly situated; DAVID DONALD WHITMAN, and all others similarly situated; BILLY FLOYD BUSH, and all others similarly situated, et al.,

Plaintiffs,
Counter-defendants,
Appellees,

versus

LIBERTY NATIONAL LIFE INSURANCE CO.,

Defendant,
Counter-claimant,
Counter-defendant,
Appellant.

On Appeal from the United States District Court for the Middle District of Florida

Appendix C

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: BLACK, FAY, and COX, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

AFFIDAVIT OF SERVICE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

---X

DAVID HIPP, BRAD STEIN, MIKE STELL,
and All Others Similarly Situated,

Petitioners,

vs.

LIBERTY NATIONAL LIFE INSURANCE COMPANY,

Respondent.

---X

STATE OF NEW YORK)

COUNTY OF NEW YORK)

I, Pablo A. Rolon, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by *Counsel of Record for Petitioners.*

That on the 13th day of November, 2001, I served the within *Petition for a Writ of Certiorari* in the above-captioned matter upon:

William J. Baxley
Joel E. Dillard
BAXLEY, DILLARD, DAUPHIN & McKNIGHT
Attorneys for Respondent
2008 3rd Avenue South
Birmingham, Alabama 35233

by depositing three copies of same, enclosed in a post-paid, properly addressed wrapper, in an official depository maintained by the United States Postal Service, via first-class mail.

That on the same date as above, I sent to this Court forty copies of the within *Petition for a Writ of Certiorari* through the United States Postal Service by Express Mail, postage prepaid.

Additionally, a courtesy copy of the within *Petition for a Writ of Certiorari* has been sent by first-class mail on this 13th day of November, 2001, to the following individuals:

Margaret Hutchins Campbell
Gregory J. Hare
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
600 Peachtree Street, N.E.
Suite 2100
Atlanta, Georgia 30308

AND

Peter W. Zinober
ZINOBER & McCREA, P.A.
201 East Kennedy Boulevard
Suite 800
Tampa, Florida 33602

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 13th day of November, 2001.

Pablo A. Rolon

Sworn to and subscribed before me this 13th day of November, 2001.

Michael DeSantis